



## **LAND USE STRATEGIES FOR PROTECTING DRINKING SOURCE WATER**

### ***Resource Guide – 2021***

This report discusses the legal authority of local governments to protect the quality of surface water and groundwater to assist local land use stakeholders participate effectively in the New York State Drinking Water Source Protection Plan (DWSP2). This report will be equally helpful for other localities to learn how to protect water quality and watersheds from land development impacts throughout the State of New York. It explains and illustrates the use of several traditional and innovative land use strategies for local land use leaders to consider adapting to their communities' circumstances. The strategies discussed include:

- Local authority to protect water quality,
- comprehensive plans,
- zoning,
- the imposition of environmental conditions on development approvals by local boards,
- subdivisions,
- cluster development,
- site plans,
- variances,
- special use permits,
- overlay zones,
- a model source water protection ordinance,
- environmental impact review,
- critical environmental areas,
- open space preservation, and
- wetlands protection.

Additional resources on these strategies and more may be found in the New York Department of State website. See:

<https://dos.ny.gov/model-local-laws-increase-resilience>  
[https://dos.ny.gov/publications?f%5B0%5D=filter\\_term%3A1716](https://dos.ny.gov/publications?f%5B0%5D=filter_term%3A1716)



## Local Legal Authority to Protect Water Quality

The New York State legislature has delegated legal authority to regulate and mitigate the effects of land use to local governments.<sup>1</sup> Along with that power, the legislature has given local governments the authority to tax land development and the responsibility to use their tax revenues to pay for the cost of municipal services. Those three powers are intertwined and create a statewide system of law that permits and controls land development in the public interest, primarily through local lawmaking and administrative procedures.

Using this legal authority, local governments may adopt comprehensive land use plans, zoning laws, subdivision and site plan regulations, and other land use laws. They may establish local land use planning, zoning appeals, and conservation boards to review and act on private sector land development proposals. As part of this approval process, they may impose conditions on land development projects that protect natural resources. Every action of a local land use board that affects the environment must be accompanied by an environmental impact review under State law.

The New York land use system encourages municipalities to adopt a comprehensive plan first and then requires that zoning and other land use regulations conform to that plan. After adopting zoning, localities typically adopt site plan and subdivision regulations, which add numerous standards with which private land development must comply. These standards can be designed to protect water quality including, of course, drinking water sources. The adoption of a comprehensive plan lays the foundation for zoning to accomplish its objectives and specify implementation techniques that should be adopted. Adopting zoning, in turn, lays the foundation for adding standards in site plan and subdivision ordinances. Where community needs require, additional land use regulations can be added to the local toolbox, tools such as overlay zoning, wetlands controls, and protected critical environmental areas.

Great flexibility is afforded to localities in creating strategies that meet local needs so long as the end in view is the appropriate use of the land. Article IX, section 3(c) of the New York Constitution requires that the home rule powers of municipalities be “liberally construed.”<sup>2</sup> This provision implies that municipal power to control land use is not subject to narrow construction by the courts and may be regarded as a powerful tool to protect water quality from deleterious land uses.

This legal system relies on local governments and democratic processes to control land uses in order to protect public health and ecosystems, including watersheds.<sup>3</sup> The delegation of that power explains why state legislatures have not vested their state

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<sup>1</sup> See Nolon, *Historical Overview of the American Land Use System*, at 821–22 (2006) (chronicling the push to legislate against water pollution beginning in the 1970s).

<sup>2</sup> N.Y. CONST. art. IX, § 3(c) (2002).

<sup>3</sup> See John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 372–73 (2002) (discussing how local land use regulation is a tool for public health and how some localities have begun to regulate land use on a watershed level).



agencies with land use control so as not to compete with or hinder this traditional local jurisdiction. It also demonstrates why the opportunity—or responsibility—rests with local governments to regulate water quality.

State legislation in most states, including New York, does not give state agencies authority to regulate most land development that contributes to groundwater contamination and nonpoint source pollution.<sup>4</sup> The New York model, perhaps more aggressive in creating and empowering water-related state agencies than most states, demonstrates the statutory limits of state agencies to control the sources of water pollution and watershed degradation.<sup>5</sup>

Under the land use authority delegated to municipalities in New York, local land use boards routinely require developers to minimize soil erosion, implement stormwater runoff measures, manage the use, storage, and placement of contaminants, and avoid excessive impervious coverage, particularly in areas prone to flooding. Many local governments understand that they need to use their delegated land use authority to respond to threats to their water bodies and watersheds. This fact sheet describes a number of traditional land use techniques and several innovative measures municipalities use to protect and conserve water. These examples are models other localities can adopt, and they illustrate the wide range of actions that they can adopt by analogy. They demonstrate how local governments can fill the gaps in state and federal regulations to create a more holistic system of water protection. These laws, and their many counterparts, are part of our national system of water law.

## **Local Land Use Tools and Techniques for Protecting Water Quality**

### ***Comprehensive Land Use Plans***

State law gives towns, villages, and cities the legal authority to adopt comprehensive plans, with which zoning and other land use laws are to conform.<sup>6</sup> Comprehensive land use plans establish goals for land use planning and define strategies to achieve those goals. They are not regulatory but guide the adoption of zoning and other land use regulations. Plans require citizen participation, which educates the public and secures strategic support for their goals and proposed implementation measures. The process of

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<sup>4</sup> See [N.Y. ENV'T. CONSERV. LAW § 15-1501 \(McKinney 2012\)](#) (setting forth strict measures as to what the DEC can govern in terms of water sources, which do not include land development that has caused groundwater contamination and other types of water pollution).

<sup>5</sup> See *id.* (authorizing the DEC to govern allocation of limited water sources among users under the state's Water Resources Law, *id.* § 15-1101, which authorizes the DEC to undertake comprehensive planning for the protection, conservation, and beneficial utilization of the water resources of the state). See *id.* [§ 15-2709](#) (managing and protecting certain “wild, scenic and recreational rivers” which can affect the scope of local land use regulations under a little-used provision of state law). Article 11, section 1100 of the Public Health Law allows the Department of Health to issue watershed rules and regulations, which can unite upstream and downstream municipalities in collaborative efforts to limit contamination of downstream public water supplies. [N.Y. PUB. HEALTH LAW § 1100 \(McKinney 2012\)](#).

<sup>6</sup> See [N.Y. TOWN LAW § 272-a](#); [N.Y. VILLAGE LAW § 7-700](#); [N.Y. GEN. CITY LAW § 28-a](#).



framing or amending plans provides an opportunity for land use leaders to identify and provide for the resolution of emerging problems, such as threats to water quality and supply. Through this process, the community assesses problems and develops techniques to address such concerns in its own way, responsive to a community's unique circumstances.

The Town of New Paltz, New York, for example, adopted a comprehensive plan that encourages water-efficient land use patterns.<sup>7</sup> As the town evaluates development proposals and adopts zoning regulations, it will be guided by the Comprehensive Plan's precept to use policies for responsible economic growth while protecting natural resources. Among the "major development policies" set forth in the Comprehensive Plan are those to protect "waterways, floodplain and wetlands by establishing guidelines and regulating development density," and "[e]ncourage higher density development to locate in areas served by public water and sewer facilities."

The Comprehensive Plan further recommends adopting into the zoning ordinance numerous techniques for protecting such natural resources. One of these techniques involves zoning land "on the basis of its developmental carrying capacity," based on the waterbodies, soil conditions, and slopes in the area. Another includes clustering development to maximize open space and mitigate adverse impacts to the environment. The Comprehensive Plan specifically recommends "that the Planning Board be allowed [to] mandate clustering in a subdivision if deemed appropriate."

### ***Zoning, Traditional Land Use Regulations, and Conditional Approvals***

Local legislative boards are permitted but not required to entertain landowners' petitions for rezoning their properties. Local planning boards and zoning boards are required to hear and decide on landowners' applications for subdivision, site plan approval, and variances. With respect to all of these approvals, local boards are allowed by law to impose conditions that protect the public health, welfare, and safety.

As discussed further below, the State Environmental Quality Review Act requires these boards to conduct environmental impact reviews and impose conditions on development proposals to mitigate any adverse environmental impacts, which, of course, include water pollution.<sup>8</sup>

Local legislative bodies may rezone properties and impose conditions that harmonize the approved project with the surrounding neighborhood.<sup>9</sup> Planning Boards in reviewing

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<sup>7</sup> TOWN OF NEW PALTZ, N.Y., TOWN OF NEW PALTZ COMPREHENSIVE MASTER PLAN 2, 23-32 (1995).

<sup>8</sup> [N.Y. ENV'T CONSERV. LAW § 8-0109](#); [6 N.Y.C.R.R. § 617 \(2019\)](#).

<sup>9</sup> Church v. Town of Islip, 168 N.E.2d 680 (N.Y. 1960).



applications for subdivision or site plan approval are empowered to impose conditions on approvals to protect natural resources.<sup>10</sup>

Zoning boards of appeal must ensure that variances given from the strict letter of the zoning code are the minimum required to alleviate the applicant's hardship and that the approved project will not have an adverse effect on the surrounding physical or environmental conditions. Zoning boards of appeal may impose conditions on variances to limit adverse impacts on the environment and character of the affected area.<sup>11</sup>

### ***Subdivision Regulations***

Local governments are authorized to adopt and implement subdivision regulations. The New York statutes define subdivision as “the division of any parcel of land into a number of lots, blocks or sites as specified in a local ordinance, law, rule or regulation . . . for the purpose of sale, transfer of ownership, or development.”<sup>12</sup>

The subdivision of land involves the legal division of a parcel into a number of lots for the purpose of development and sale. By adopting and applying subdivision regulations, a municipality ensures that new development is cost-effective, is properly designed, and has a favorable impact on the community and the environment. The New York statutes permit, but do not require, local legislative bodies to adopt regulations and procedures for the review and approval of subdivisions. The local legislature may authorize the planning board to review and approve subdivision applications. Subdivision regulations can contain detailed standards to ensure that land development will not adversely affect natural resources, aesthetics, historic sites, or other critical resources.

Subdivision regulations provide for the future growth and development of the community by affording adequate facilities for the housing, transportation, distribution, comfort, convenience, safety, health, and welfare of its population. Landowners are required to obtain approval before subdividing and developing land to ensure that considerations such as drainage, erosion, traffic safety, and wastewater disposal are properly addressed. Subdivision regulations carry out the comprehensive plan of a municipality and supplements zoning provisions.

Local subdivision regulations may authorize the planning board to review the effect of the proposed development on natural resources. The regulations may require the board to consider the condition of soils, the slope of the land, and the existence of vegetation, among other matters, and to impose conditions to ensure the integrity of the site and

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<sup>10</sup> [N.Y. TOWN LAW § 276\(4\)\(e\)](#) (a planning board may approve “a final plat subject to conditions set forth by the planning board in a resolution conditionally approving such plat”); *Id.* [§ 274-a\(4\)](#) (“The authorized board shall have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to a proposed site plan.”); [N.Y. VILLAGE LAW § 7-725-a\(4\)](#); *Id.* [§ 7-728\(4\)\(e\)](#); [N.Y. GEN. CITY LAW § 27-a\(4\)](#); *Id.* [§ 32\(4\)\(e\)](#).

<sup>11</sup> [N.Y. TOWN LAW § 267-b\(4\)](#); [N.Y. VILLAGE LAW § 7-712-b\(4\)](#); [N.Y. GEN. CITY LAW § 81-b\(5\)](#).

<sup>12</sup> [N.Y. TOWN LAW § 276\(4\)\(a\)](#); [N.Y. VILLAGE LAW § 7-728\(4\)\(a\)](#); [N.Y. GEN. CITY LAW § 32\(4\)\(a\)](#).



surrounding properties. In order to determine whether proposed construction will have a negative impact on environmental resources, subdivision regulations can require applicants to include detailed information about on-site and nearby environmental conditions in their applications.

Many subdivision regulations make general statements about preserving natural features. However, Chester’s regulations are very specific. One section states that the “Planning Board shall, wherever possible, require the preservation of all natural features which add value to residential developments and to the community, such as large trees or groves, watercourses and falls, beaches, historic spots, vistas and similar irreplaceable assets.”<sup>13</sup> The code also states whether septic systems are allowed for each soil type, and it identifies the erosion risk level.<sup>14</sup> For soil types that typically pond with water, the code requires the replacement of stormwater storage lost due to development. The Town of Wallkill also has extensive subdivision regulations that mitigate erosion and groundwater pollution.<sup>15</sup> For example, its code divides the entire area of the town in 15 soil groups, with specific regulations tailored to each group. Based on such soil groups, the code assigns an environmental factor that limits subdivision density.

### ***Cluster Subdivisions***<sup>16</sup>

The New York statutes define cluster development as “a subdivision . . . in which the applicable zoning ordinance or local law is modified to provide an alternative permitted method for the layout, configuration and design of lots, buildings and structures, roads, utility lines and other infrastructure, parks, and landscaping in order to preserve the natural and scenic qualities of open lands.” The statutes state that cluster development may not allow greater density than if the land “were subdivided into lots conforming to the minimum lot size and density requirements . . . of the zoning district in which the property is located.”

The local legislature may authorize the planning board to modify the dimensional provisions of the zoning law to cluster the development of the subdivided parcels. Such modifications allow the subdivision plat to include alternative methods of laying out the lots, buildings, and other improvements in lieu of the layout dictated by the height, setback, parking, landscaping, or other provision of the zoning law. This flexibility can allow the board and the applicant to design developments to minimize their impacts on water quality.

The purpose of authorizing such modifications is to provide flexibility of design in order to preserve the natural and scenic qualities of open lands subjected to subdivision. By clustering the permitted development on the site, the planning board can preserve open

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<sup>13</sup> TOWN OF CHESTER, N.Y., CODE § 83-24(c).

<sup>14</sup> *Id.* §§ 83-25, 83-26.

<sup>15</sup> TOWN OF WALLKILL, N.Y., CODE § 209-23.

<sup>16</sup> [N.Y. TOWN LAW § 278](#); [N.Y. VILLAGE LAW § 7-738](#); [N.Y. GEN. CITY LAW § 37](#).



space and natural resources much more effectively. The planning board may establish various conditions on the ownership, use, and maintenance of such open lands as necessary to assure the preservation of the natural and scenic quality of the preserved open lands.

The Town of Warwick’s code provides for cluster subdivisions, which focus on grouping houses to preserve high-quality open space, with a specific design process to maximize conservation value.<sup>17</sup> Density bonuses are available for extra conservation measures.<sup>18</sup> The town also provides a conservation density subdivision option, allowing low-density subdivisions with shared driveways.

The zoning code for the Town of Hamptonburgh authorizes the Planning Board to require the applicant to submit a conservation subdivision design when necessary to protect important natural features.<sup>19</sup> As an incentive, it also provides a density bonus “if a minimum of 50% of the land area in the subdivision is set aside as a separate parcel and reserved in perpetuity as open space.”

### ***Site Plan Regulations<sup>20</sup>***

A “site plan” is defined by state law as a drawing, prepared in accordance with local specifications, that shows the “arrangement, layout and design of the proposed use of a single parcel of land.”<sup>21</sup> Site plan regulations are adopted by the local legislature as part of the zoning law or as a separate set of regulations and contain the specifications that the site plan drawing must include and the standards it must meet. The purpose of site plan regulations is to ensure that the development of individual parcels of land does not have an adverse impact on adjacent properties or the surrounding neighborhood. Such regulations also ensure that the parcel’s development fits properly into the community and conforms to its planning objectives.

Local site plan regulations require the developer of an individual parcel of land to file a drawing of that parcel’s planned development for review and approval by a local board. When such regulations have been adopted, individual parcels subject to their terms may not be developed until a site plan has been submitted, reviewed, and approved. Site plan regulations require that certain elements be shown on the drawing, including access, parking, landscaping and buffering, drainage, utilities, roads, curbs, lighting, and the location and dimensions of the principal and accessory buildings and any other intended improvements. Some communities require site plans, particularly those of larger projects, to show adjacent land uses and to provide a narrative statement of how the site’s development will avoid or mitigate adverse impacts on them.

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<sup>17</sup> TOWN OF WARWICK, N.Y., CODE § 164-41.1.

<sup>18</sup> *Id.* § 164-41.2.

<sup>19</sup> TOWN OF HAMPTONBURGH, N.Y., CODE § 150-21.

<sup>20</sup> [N.Y. TOWN LAW § 274-a](#); [N.Y. VILLAGE LAW § 7-725-a](#); [N.Y. GEN. CITY LAW § 27-a](#).

<sup>21</sup> *Id.*



Site plan regulations adopted by the Town Board in Greenburgh, New York, require its planning board to ensure that new and renovated buildings are water efficient.<sup>22</sup> Under the town's Green Building Initiative and Energy Construction Standards, an applicant seeking site plan review must submit a Green Building Project Checklist completed by a LEED Accredited Professional, a Green Building Worksheet, and any other documents that may be necessary to demonstrate compliance with the town's green building requirements.<sup>23</sup> Site plan approval will not be granted until the designated Green Building Official of the town approves the design and construction plans of the applicant. A building permit and certificate of occupancy will not be issued unless plans and actual construction comply with the checklist, and, uniquely, post-occupancy documentation is required to show continuing compliance with the standards.

### ***Variances***

A variance allows property to be used in a manner that does not comply with the literal requirements of the zoning ordinance.<sup>24</sup> There are two types of variances: area and use. A use variance permits "a use of the land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations." For example, if a piece of land is zoned for single-family residential use and the owner wishes to operate a retail business, the owner could apply to the zoning board of appeals for a use variance. An area variance, on the other hand, allows for a "use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulation." An area variance is needed when a building application does not comply with the setback, height, or area requirements of the zoning ordinance. If an owner wants to build a deck on his house which encroaches slightly into a side yard setback area, he could apply to the zoning board of appeals for an area variance.

Variances provide flexibility in the application of the zoning law and afford the landowner an opportunity to apply for administrative relief from certain provisions of the law. A property owner may seek a use or area variance when an application for a building permit is denied on the grounds that the proposal violates the use or dimensional requirements of the zoning ordinance. In granting variances, the zoning board of appeals has the discretion to limit the extent and nature of the variance to protect natural resources, including surface water and groundwater quality.

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<sup>22</sup> See GREENBURGH, N.Y., CODE § 233-1 (2009).

<sup>23</sup> *Id.* § 233-5(A); see also *Checklist: LEED v2009 for New Construction*, U.S. GREEN BLDG. COUNCIL, <https://www.usgbc.org/resources/new-construction-v2009-checklist.xls> (last visited Dec. 29, 2019) (providing a link to the LEED project checklist "for [n]ew [c]onstruction and [m]ajor [r]enovations"). "LEED, or Leadership in Energy and Environmental Design, is the most widely used green building rating system in the world. Available for virtually all building, community and home project types, LEED provides a framework to create healthy, highly efficient and cost-saving green buildings. LEED certification is a globally recognized symbol of sustainability achievement." *Green Building Leadership Is LEED*, U.S. GREEN BLDG. COUNCIL, <https://new.usgbc.org/leed> (last visited Dec. 29, 2019).

<sup>24</sup> [N.Y. TOWN LAW § 267\(1\)](#); [N.Y. VILLAGE LAW § 7-712\(1\)](#); [N.Y. GEN. CITY LAW § 81-b\(1\)](#).



## ***Special Use Permits***

New York statutes define a special use permit as the “authorization of a particular land use which is permitted in a zoning ordinance or local law, subject to requirements imposed by such zoning ordinance or local law to assure that the proposed use is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such requirements are met.”<sup>25</sup>

The reviewing board has the authority to attach conditions to the issuance of special permits that are directly related to and incidental to the proposed special use. Any such conditions imposed must be met by the landowner before building permits, certificates of occupancy, and other agency permits can be issued.

The Town of Pine Plain’s zoning code requires a special use permit for certain logging activities.<sup>26</sup> Additional permits for stream and wetland disturbance may also be required to receive a special use permit. The Planning Board can seek advice from the Soil & Water Conservation District in reviewing the plan. The Zoning Enforcement Officer may stop logging operations if conditions make soil erosion probable.

To protect the Town of New Paltz from potential negative impacts of erosion, siltation, pollution of water supplies, slope failure, and increase in downstream runoff, the town’s zoning code imposes special use permitting requirements for development on steep slopes (those with a topographical gradient of 15% or greater).<sup>27</sup> Under these regulations, soil stabilization measures must be applied to certain areas of disturbance, and any proposed disturbance of steep slopes must be undertaken with consideration of the soil’s characteristics.

## ***Overlay Zoning***

An overlay district is created by the local legislature by identifying a special resource or development area and adopting new provisions that apply in that area in addition to the provisions of the zoning ordinance. The provisions of an overlay district can be more restrictive or more permissive than those contained in the zoning district. The term “overlay district” refers to the superimposition of the new district’s lines on the zoning map’s district designations. An overlay district can be coterminous with existing zoning districts or may contain only parts of one or more such districts.

Overlay zones create a framework for the conservation or development of special geographical areas. In a special resource overlay district, overlay provisions typically impose greater restrictions on the development of land, but only regarding those parcels whose development, as permitted under the zoning ordinance, may threaten the viability

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<sup>25</sup> [N.Y. TOWN LAW § 274-b](#); [N.Y. VILLAGE LAW § 7-725-b](#); [N.Y. GEN. CITY LAW § 27-b](#).

<sup>26</sup> TOWN OF PINE PLAINS, N.Y., CODE § 275-56(P).

<sup>27</sup> TOWN OF NEW PALTZ, N.Y., CODE §§ 140-133, 140-134, 140-137.



of the natural resource.<sup>28</sup> In a development area overlay district, the provisions may impose restrictions as well,<sup>29</sup> but also may provide zoning incentives and waivers to encourage certain types and styles of development. Overlay zone provisions are often complemented by the adoption of other innovative zoning techniques, such as floating zones, special permits,<sup>30</sup> incentive zoning, cluster development, and special site plan or subdivision regulations, to name a few.

The Town of Goshen, New York, has multiple overlay zones for environmentally sensitive areas in its comprehensive plan and zoning ordinance.<sup>31</sup> The Flood Plain and Ponding Area Overlay District controls development within areas subject to periodic inundation and ponding. The Stream Corridor and Reservoir Watershed Overlay District applies to land adjacent to the Wallkill River and other streams, as well as “all lands lying within the Village of Goshen water supply reservoir watersheds.” It requires site plan review and erosion and sediment plans for projects that wouldn’t otherwise receive those protections. The Aquifer Overlay District protects groundwater resources that provide both public water supplies and drinking water for private wells. Regulations for this district “set the maximum potential limit for density or intensity of development on a particular site,” based primarily upon a Potable Water Study that mapped the town into watersheds. The code also incorporates pollution controls in these districts to protect groundwater.

The Town of Big Flats also adopted an Aquifer Protection Overlay District (APOD) to protect its drinking water aquifers.<sup>32</sup> Its APOD designates three groundwater areas for protection based on soil types, permeability, and development pressures. Proposed development in each groundwater area district is subject to project review processes and standards that apply in addition to the underlying zoning and site plan regulations. The APOD prohibits high-risk land uses and gives the planning board, as it reviews and approves projects, authority to request additional information from professional hydrogeologists or other experts to ensure protection from harmful commercial and industrial uses proposed within the APOD areas.

The Town of Dover has an Aquifer Overlay District. The regulations for this district require that “any wells identified and declared public water systems” be “protected by a circular

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<sup>28</sup> See, e.g., TOWN OF WALLKILL, N.Y., CODE § 249-106 (prohibiting “[a]ny land disturbing activity including, but not limited to, construction, excavating, and tilling” in the Shawangunk Kill Corridor Preservation Overlay District); TOWN OF WARWICK, N.Y., CODE § 164-47.2 (listing various use restrictions and requirements that apply to land within in the Aquifer Overlay District and one mile of community water supply wells or springs).

<sup>29</sup> See, e.g., TOWN OF ROSENDALE, N.Y., CODE § 76-58 (listing development standards and general design guidelines for development in the Binnewater Lates Conservation Planned Development Area).

<sup>30</sup> See, e.g., TOWN OF WAWAYANDA, N.Y., CODE § 195-25 (requiring special use permits for “any proposed use or activity that removes 1,000 gallons per day or more from the aquifer”); TOWN OF AMENIA, N.Y., CODE § 121-15 (requiring special permits within the Buffered Valley Bottom Aquifer and Upland Aquifer areas for certain uses that are permitted in the underlying land use district).

<sup>31</sup> GOSHEN, N.Y., UPDATED COMPREHENSIVE PLAN FOR THE TOWN OF GOSHEN 33 (2009); TOWN OF GOSHEN, N.Y., CODE §§ 97-25, 97-26, 97-27.

<sup>32</sup> TOWN OF BIG FLATS COMPREHENSIVE PLAN 32 (2006); TOWN OF BIG FLATS, N.Y., CODE § 17.24.020.



wellhead buffer with a two-hundred-foot radius.<sup>33</sup> These wellhead buffers are generally not to be “used for any purpose other than public water supply.” The regulations also limit numerous potentially polluting uses and activities in this district.

### ***Model Source Water Protection Ordinance***<sup>34</sup>

Dutchess County, NY, developed a Model Water Resource Management Zoning Ordinance for the protection of groundwater resources to be used by municipalities<sup>35</sup> within its jurisdiction as a complement to existing local water resource protection laws and to fill gaps in State or Federal programs in order to achieve full watershed management protection. Based on discussions with community members and legal and hydrologic experts, the ordinance is designed in two versions to be adopted either with equal protections community-wide (as in Version II) or with some general community-wide protections paired with heightened standards in high-priority areas (as in Version I, which requires the community to identify and map priority water protection areas—i.e., present or future high-capacity areas).

Under both versions of the model ordinance, any uses and land subdivisions where water consumption exceeds natural recharge are allowed only by special permit (except in the case of conflicting state or federal regulations, which control), leaving uses and land subdivisions where consumption is less than or equal to natural recharge to be permitted as-of-right based on the underlying zoning. The recharge rate is to be calculated using the ordinance’s stipulated water budget methods. The ordinance sets forth conditions for the issuance of a special permit, including a requirement that projects demonstrate, as part of the required environmental review process, how the water budget and water-quality impacts will be mitigated. The ordinance also bolsters the community’s existing special permit application requirements, adding that applicants must identify, among other things, the source of the water being used, water quantity required, water-use minimization measures to be implemented, water-recycling measures to be implemented, and measures used to enhance onsite recharge.

### ***Conditions Imposed on Development Projects Under SEQRA***

The State Environmental Quality Review Act (SEQRA) applies to all agencies and instrumentalities of the state, including local agencies such as legislatures, planning boards, and zoning boards of appeal.<sup>36</sup> Local agency decisions on applications for site

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<sup>33</sup> TOWN OF DOVER, N.Y., CODE § 145-15.

<sup>34</sup> *Water and Wastewater Issues, Model Aquifer Protection Laws*, DUTCHESS COUNTY, NY, <http://www.dutchessny.gov/CountyGov/Departments/Planning/16891.htm> (last visited December 31, 2017).

<sup>35</sup> Since its creation in 2009, the model ordinance has been adopted by several communities in Dutchess County, NY. For example, the Town of Philipstown adopted the ordinance in full, while the towns of Dover, Amenia, and Pleasant Valley adopted modified versions.

<sup>36</sup> Article 8 of the New York Environmental Conservation Law. The regulations are found in Part 617 of the New York Code of Rules and Regulations ([6 N.Y.C.R.R. Part 617](#)).



plan or subdivision approval or the issuance of variances and special permits must be preceded by an assessment of the environmental impact of the proposed project. SEQRA gives local land use agencies independent authority to impose conditions on land use approvals to mitigate the potential adverse impacts of proposed projects on the environment. The environment is defined very broadly. SEQRA extends local agency authority to impose conditions on land use approvals for the protection of any aspect of the environment. With regard both to these substantive conditions and to the procedures that proposals must follow, SEQRA amounts to a regulatory overlay on the process of reviewing and approving applications for land use approvals.

### ***Critical Environmental Area Designation under SEQRA***

The SEQRA regulations define a Critical Environmental Area (CEA) as “a specific geographic area having exceptional or unique environmental characteristics that has been designated by a State or local agency.”<sup>37</sup> The focus of a CEA is on the definition of the critical area and the identification of its unique and exceptional environmental characteristics. A CEA identifies fragile or threatened areas to ensure that their particular characteristics are understood and taken into consideration in the conduct of environmental reviews on subsequent individual projects. After an area’s designation as a CEA, local, county, and state agencies considering actions that will affect the CEA are required to consider the impact of those actions on the specific environmental characteristics contained in the designation of the CEA. This will frequently justify, if not require, a higher level of environmental review of projects proposed in or near a CEA.

The Town of Shawangunk identified the Wallkill public water supply, watershed, and the Tin Brook Aquifer as a CEA.<sup>38</sup> This CEA protects drinking water wells for the hamlet of Wallkill. An overlay zone complements the CEA by placing controls over development to protect both the quality and quantity of water in the Tin Brook Aquifer.<sup>39</sup> Similarly, the Town of Newburgh designated a CEA around Chadwick Lake, a drinking water source.<sup>40</sup> Newburgh’s town code specifies that all development in CEAs should be treated as Type 1 actions under SEQRA, and it specifies limits for development within the Chadwick Lake CEA in particular.<sup>41</sup>

### ***Open Space Preservation***

It is within the legal authority of most localities to include components in their comprehensive plans that focus on natural resource conservation and ecosystem protection. The zoning ordinance of the Town of La Grange refers to open space

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<sup>37</sup> [6 N.Y.C.R.R. 617.2\(i\)](#).

<sup>38</sup> N.Y. DEP’T OF ENV’T CONSERVATION, WALLKILL PUBLIC WATER SUPPLY, WATER SHED, & AQUIFER CRITICAL ENVIRONMENTAL AREA (CEA), [https://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/wallkillpws.pdf](https://www.dec.ny.gov/docs/permits_ej_operations_pdf/wallkillpws.pdf).

<sup>39</sup> TOWN OF SHAWANGUNK, N.Y., CODE § 177-6(N).

<sup>40</sup> N.Y. DEP’T OF ENV’T CONSERVATION, CHADWICK LAKE RESERVOIR ENVIRONS CRITICAL ENVIRONMENTAL AREA (CEA), [https://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/chadwicklkres.pdf](https://www.dec.ny.gov/docs/permits_ej_operations_pdf/chadwicklkres.pdf).

<sup>41</sup> TOWN OF NEWBURGH, N.Y., CODE § 185-22(c).



provisions in its comprehensive plan and adopted a zoning ordinance intended to guide the future growth of the town and to preserve open space and other natural and historic resources of the town.<sup>42</sup> The zoning ordinance of the Town of Dover includes among its purposes the conservation of natural resources, the preservation of agricultural land and open space, growth management, and the protection of large contiguous areas of undeveloped land.<sup>43</sup>

Local communities use numerous methods to preserve open space through zoning and proactive preservation programs. For example, the Town of Dover has established very low-density rural and resource conservation districts, along with a variety of mixed-use districts that protect floodplains, stream corridors, and aquifers. The Town of Gardiner established Rural Agriculture and Shawangunk Ridge Protection districts, which prioritize open space protection by requiring a conservation analysis for certain subdivision applications in these districts.<sup>44</sup> In the Town of Goshen, most of the developable land is zoned as “rural,” with specific development options, such as “open space development” and “conservation density development” that preserve open space.<sup>45</sup> Floating zones in the Town of Warwick offer incentives for development in accordance with open space preservation when deemed appropriate by the town board.<sup>46</sup> This town’s Planning Board may also require cluster subdivisions where it finds that certain natural resources are present. In the Town of Red Hook, incentive zoning is used to preserve open space.<sup>47</sup>

The [Water Quality Improvement Project \(WQIP\) Program](#) provides grants to municipalities and land trusts to purchase parcels and/or conservation easements for land that is near an active public drinking water supply for source water protection.

Other ways of preserving open space may involve the acquisition or transfer of development rights. The Town of Goshen has established an Open Space Preservation fund, managed by an Open Space Board, which is used to purchase development rights in targeted open space and farmland.<sup>48</sup> In the Town of New Paltz, a Clean Water and Open Space Commission guides the acquisition of development rights in farmland and open space and stewardship of those lands.<sup>49</sup> This town established a Preservation and Investment Fund for such purpose. In the Towns of Warwick and Rhinebeck, programs allow for the transfer of development rights from districts with important natural resources to those districts where density is desired.<sup>50</sup>

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<sup>42</sup> TOWN OF LA GRANGE, N.Y., CODE § 240-13 (2011).

<sup>43</sup> TOWN OF DOVER, N.Y., CODE § 145-3 (2011).

<sup>44</sup> TOWN OF GARDINER, N.Y., CODE § 220-19.

<sup>45</sup> TOWN OF GOSHEN, N.Y., CODE § 97-18.

<sup>46</sup> TOWN OF WARWICK, N.Y., CODE § 164-47.6.

<sup>47</sup> TOWN OF RED HOOK, N.Y., CODE § 143-49.2.

<sup>48</sup> TOWN OF GOSHEN, N.Y., CODE § 71-5.

<sup>49</sup> TOWN OF NEW PALTZ, N.Y., CODE §§ 44-2, 44-4.

<sup>50</sup> TOWN OF WARWICK, N.Y., CODE § 164-47.4; TOWN OF RHINEBECK, N.Y., CODE § 125-64.



## **Wetlands Protection**

Federal and state laws provide limited protection of certain wetlands and streams. Under the Freshwater Wetlands Act, New York State regulates freshwater wetlands that are 12.4 acres or greater in size and a limited number of smaller wetlands of unusual local importance.<sup>51</sup> The U.S. Army Corps of Engineers regulates wetlands in New York, irrespective of size, under Section 404 of the Clean Water Act.<sup>52</sup> However, the definition of waters of the U.S., which includes wetlands, has been subject to numerous revisions,<sup>53</sup> thus impacting the federal jurisdiction of wetlands.

Municipalities can protect smaller and seasonal wetlands and streams that often escape protection under state and federal law. Local governments are free to regulate any freshwater wetland under municipal authority.<sup>54</sup> NOTE: Local governments cannot be less restrictive than Article 24 if they assume local implementation of Article 24, Title 5.

Local planning and zoning boards may regulate development activities that affect wetlands as they review and approve developers' applications. This happens, for example, when the local legislature adopts standards to protect wetlands in subdivision, site plan, and special permit regulations, or to adopt discrete wetlands regulations and create wetlands boards that issue wetlands permits. When local wetlands laws are adopted, local administrative bodies may take the impact of proposed projects on wetlands into consideration and impose conditions, or deny applications, to protect the wetlands' functions as a routine part of their development review and approval process.

The Town of Kent adopted its Freshwater Wetlands Protection and Drainage Law to:

[P]reserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands and to regulate the development of such wetlands in order to secure the natural benefits of freshwater wetlands, consistent with the general welfare and beneficial economic, social and agricultural development of the Town.<sup>55</sup>

The town's law regulates contiguous wetlands covering at least 40,000 square feet (about one acre) that are identified by water saturation during at least three consecutive months or by the presence of aquatic or semiaquatic vegetation of the type listed in §24-0107 of the State Freshwater Wetlands Act or certain listed soils types as defined by the U.S. Department of Agriculture's Natural Resource Conservation Service.

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<sup>51</sup> N.Y. ENV'T. CONSERV. Law § 24-0301.

<sup>52</sup> 33 U.S.C. § 1344; Clean Water Act § 404.

<sup>53</sup> <https://www.epa.gov/wotus/about-waters-united-states>.

<sup>54</sup> [N.Y. ENV'T. CONSERV. LAW § 24-0509](#).

<sup>55</sup> TOWN OF KENT, N.Y., CODE § 39A-2.



Kent's wetlands law regulates a number of listed activities, including erecting or enlarging any structure of any kind, road construction, digging wells, installation of septic tanks, sewage treatment effluent discharge, draining, dredging, excavation, any form of deposit or storage of any material, use of off-road vehicles, tree and brush cutting, and "any other activity which substantially impairs any of the several functions served by wetlands." Certain activities are permitted as-of-right on wetlands within limits. These include gardening, removal of natural products of wetlands, outdoor recreation, grazing and farming, and dam operation and maintenance.

Under Kent's local law, any person proposing a regulated activity must file an application for a permit. When a regulated activity also requires an application to the town board, planning board, or zoning board of appeals, that body is given jurisdiction over the wetlands application and issues or denies the wetlands permit. These approving authorities must refer the matter to the local wetlands inspector and conservation commission for their review and written report on the matter. This referral can take no longer than 30 days, and inaction by the inspector and commission during this period is deemed to indicate no objection to the application. Public hearings on the wetlands permit application are held in conjunction with any public hearing required for any other land use approval than the regulated activity requires. Where no application and approval other than the wetlands permit is required, the town engineer has the approving authority regarding wetlands protection.

Where the activity is subject to other land use approval, a decision on the wetlands permit is to be made simultaneously with the determination on that other approval. Otherwise, the authority considering the application must approve, deny, or approve with modifications within 60 days of its receipt. The Kent law contains a list of standards to be used in determining whether to approve, condition, or deny a permit application. These include the environmental impact of the proposed activity, the suitability of the activity in the area, alternatives to the activity, and "the extent to which the exercise of property rights and the public benefit derived from [the activity] may outweigh or justify the possible degradation of the wetland." Enforcement of the provisions of the town's wetlands law is delegated to the wetlands inspector.

In the Town of New Paltz, a comprehensive Wetland and Watercourse protection ordinance protects streams, wetlands, vernal pools, and associated buffer areas by regulating land disturbance, dumping, construction, and other activities.<sup>56</sup> For intermittent watercourses, a 50-foot buffer is used to protect these features; for perennial watercourses, quality vernal pools, and wetlands, a buffer area of 100 feet is used. Additionally, the regulations designate a 200-foot buffer for the Walkkill River.

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<sup>56</sup> TOWN OF NEW PALTZ, N.Y., CODE § 139-5.



The Town of Lewisboro similarly protects wetlands and streams by regulating filling and construction activities within wetlands, watercourses, and associated buffers of 150 feet.<sup>57</sup> The Town of Gardiner adds some extra protections to state-protected streams, regulating disturbance within 150 feet of Class AA, A, B, and C(T) streams.<sup>58</sup> Additionally, it authorizes the Planning Board to require protections for state or federally-designated wetlands.

For more information on land use techniques that communities can use to protect natural resources see: <https://appsrv.pace.edu/gainingground/>. Searching by topic will take you to links to local laws adopted to address matters of interest to your community.

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<sup>57</sup> TOWN OF LEWISBORO, N.Y., CODE §§ 217-2, 217-3.

<sup>58</sup> TOWN OF GARDINER, N.Y., CODE § 220-35; see also [N.Y. ENV'T. CONSERV. LAW § 24-0509](#).