

# ENVIRONMENTAL LAW IN NEW YORK

ARNOLD & PORTER

LEXIS  
Publishing

Volume 11, No. 9

September 2000

## Zoning Enforcement Law in New York State Part I

by Deborah A. Goldberger

*Editor's Note: Part I of this article examines municipal authority to enforce zoning laws and describes various types of zoning regulations currently subject to enforcement. The article explains the importance of zoning law enforcement, and addresses the procedures available to accomplish effective enforcement. Part I also describes the different positions of the Building Inspector and the Zoning Enforcement Officer, and identifies what parties are permitted to implement the various enforcement procedures. Part II of the article, which will appear in the October issue, addresses the limitations on zoning enforcement. Part II recommends that a municipality thoroughly analyze its delegated authority to ensure adequate enforcement.*

### I. INTRODUCTION

Zoning laws are adopted by local governments to protect the health, safety and general welfare of the community. This is primarily accomplished by the division of land into zoning districts that are subject to certain use restrictions.<sup>1</sup> These restrictions are imposed with the goal of protecting the community from the adverse effects of uncontrolled and unharmonious land use and growth. Yet, even where municipalities have adequate or exceptional zoning codes and other land use regulations, their provisions must be competently enforced for the public interest to be protected.

Zoning enforcement officers are subject to numerous limitations in accomplishing that task. Furthermore, the law in this area is often confusing and in conflict. Local zoning codes are

often ambiguous, lack clear standards and enforcement provisions, and fail to state clearly the authority delegated to their zoning enforcement officers. The fact that many municipalities have only part time officers and devote inadequate funds to enforce zoning laws makes the task even more difficult. Because lack of effective enforcement renders the zoning and land use laws of a municipality virtually meaningless, the municipality must take every possible step to alleviate these difficulties.

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"New Solutions to Environmental Problems in Business and Real Estate Deals," sponsored by the Practising Law Institute, Manhattan. Information: (800) 260-4PLI, www.pli.edu.

## WORTH READING

Michael B. Gerrard, "Attempted Extraterritorial Control of Pollution," *New York Law Journal*, May 26, 2000, at 3.

John R. Nolon, "Community Planning Requires Protecting Open Space," *New York Law Journal*, June 21, 2000, at 5.

Patricia E. Salkin, "Quality Communities: New York's Response to Smart Growth," *Municipal Lawyer*, Mar./Apr. 2000, at 2.

## Zoning Enforcement Law in New York State Part I

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Section II of this article will address the authority delegated to municipalities to enforce the zoning law and the importance of effectively enforcing this law. Section III will explain the different types of regulations that are being enforced and will differentiate between the positions of Building Inspector and Zoning Enforcement Officer. Section IV will set forth the possible procedures that can be used to enforce the zoning code and will identify the parties who are permitted to implement each of these procedures.

Sections V and VI will be presented in next month's (October's) issue. Section V will discuss the limitations that are placed on enforcement and defenses that are available to a person in violation of the zoning law. Section VI will conclude that zoning enforcement raises difficult problems which need to be

addressed to aid municipalities in achieving compliance with their zoning laws.

## II. ZONING ENFORCEMENT AND ITS IMPORTANCE

### A. Delegation of Zoning Enforcement Powers

The New York State Constitution gives the State Legislature the police power, which is defined as "the power that is held by the state to legislate for the purpose of preserving the public health, safety, morals, and general welfare of the people of the state."<sup>2</sup> The Legislature, in turn, delegated part of this power to municipalities to adopt zoning and other land use laws.<sup>3</sup> Section 261 of New York Town Law states that:

[T]he town board is empowered by local law or ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.<sup>4</sup>

Because police power regulations protect the welfare of the public, courts interpret such power broadly.<sup>5</sup> Zoning ordinances are given a strong presumption of constitutionality that must be overcome by the person who is challenging the regulation.<sup>6</sup> In order to overcome the presumption, the "party [attacking] a zoning ordinance must show that it is not justified under the police power by any reasonable interpretation of the facts."<sup>7</sup>

The authority to enforce zoning laws was delegated to the municipality as well.<sup>8</sup> Section 135 of the Town Law provides that a violation of any provision of the zoning ordinance or building code is considered an offense against that code or ordinance and is punishable by a fine, imprisonment, or both. This section also explicitly states that an injunctive action may be brought in addition to a criminal action or an action seeking a civil penalty.<sup>9</sup> Section 7-714 of the Village Law states that in order to prevent or correct any violations of the zoning law "the proper local authorities of the village, in addition to other remedies, may institute any appropriate action or proceedings . . ."<sup>10</sup> Section 20(22) of the General City Law enables cities to "regulate by ordinance any matter within the powers of the city, and to provide penalties, forfeitures and imprisonment to punish violations thereof, and to maintain an action or proceeding . . . to compel compliance with or restrain by injunction the violation of any such ordinance . . ."<sup>11</sup> Specific fines, which increase with each violation that occurs within a certain time period, are set forth in section 268 of the Town Law and section 20-2006 of the Village Law.<sup>12</sup> In addition, section 268 of Town Law provides for the initiation of "any appropriate action or proceeding to prevent [a violation of the zoning law]."<sup>13</sup> The Town Law also allows an action to be brought against the violator by "three taxpayers" if they have notified the town and no action has been taken by the town within ten days.<sup>14</sup> While the General City Law does not contain a specific provision that establishes the fines for each violation, section 20 permits a city

to "provide penalties, forfeitures and imprisonment to punish violations [of city ordinances]." <sup>15</sup>

Detection and enforcement of zoning violations has been further delegated by the municipality to the zoning enforcement officer. <sup>16</sup> This authority allows the officer to enter and inspect premises in order to enforce the zoning code. <sup>17</sup> While this authority is also part of the police power, it is subject to numerous limitations to be discussed at length in this article.

In addition to the Town, Village and General City Laws, the zoning enforcement officer receives authority from the Criminal Procedure Law. The zoning enforcement officer may bring criminal proceedings, civil proceedings seeking an injunction, or civil proceedings to recover a penalty against a person in violation of the zoning law. <sup>18</sup> The recovery of civil penalties is considered a quasi-criminal proceeding. <sup>19</sup>

### B. The Consequences of Ineffective Enforcement

Although zoning enforcement officers have this authority, effective zoning enforcement is not always accomplished and the lack of sufficient enforcement can have far-reaching effects on a municipality. One of the most important factors is the damage that uncontrolled growth can have on the environment. For example, an application for site plan approval might be approved subject to certain conditions related to the environment. The condition may limit the number of structures that can be built on the lot due to the presence of wetlands and require the placement of the structures so that they are outside of a specific buffer area surrounding the wetland. It is the responsibility of the zoning enforcement officer to monitor the construction to ensure that the condition placed on the site plan approval is met. <sup>20</sup> Failure of the zoning enforcement officer to enforce such a condition will lead to inefficient growth within the municipality and may have irreparable adverse effects on the wetland area.

The legitimate exercise of zoning enforcement is also critical in preventing liability on the part of the municipality. A number of cases have held municipalities liable, and have awarded large monetary judgments, for enforcing the zoning law in an arbitrary and capricious manner in a way that infringes on the rights of landowners. In one case, the New York Court of Appeals affirmed an award to a landowner of over five million dollars, in addition to legal fees and expenses, for an arbitrary and capricious revocation of a building permit. <sup>21</sup> The court found that the building permit had been revoked, not because the developer had committed any violation of the zoning law, but because there was strong community resistance to the project. <sup>22</sup> The court further found the municipality liable because the building inspector "exercised his legal authority for political reasons at the direction of the Town Supervisor." <sup>23</sup>

Zoning enforcement is also essential in order to protect the property rights of other citizens within the municipality. A violation of the zoning code could have a significant adverse effect on the property or even on the individual. For example, if someone operated a commercial establishment in a residential zone, the noise, pollution, and excess traffic could have a severe

adverse effect on an adjoining property owner's ability to enjoy the use of her property or on the value of her property if she decided to sell it. Although in this case, the neighboring property owners might be able to bring their own nuisance action, the enforcement of the zoning law assures a property owner who suffers such damage that it will not be allowed to continue. Furthermore, as zoning regulations are enforced against property owners who maintain dangerous conditions, they protect the citizens of a municipality as well as their property. <sup>24</sup>

Finally, zoning enforcement is extremely important because, by necessity, it generally remains a local issue. With the exception of some municipalities that may enter into inter-municipal agreements, each municipality is responsible for enacting and enforcing its own zoning laws. <sup>25</sup> Consequently, unless each municipality does its part to ensure that regulations are enforced, it will be impossible for anyone to predict the trend of future regional growth, even if local zoning codes are studied and analyzed. While zoning is a local issue, municipalities still need to consider regional needs and future growth so that municipalities can complement each other on a regional, and even larger, scale.

### III. REGULATIONS ENFORCED

The duty of enforcing the zoning code belongs either to the building inspector or the zoning enforcement officer, depending upon the municipality. <sup>26</sup> In smaller municipalities, enforcement is the responsibility of the building inspector. <sup>27</sup> Other municipalities, generally larger, create a separate department to administer and enforce the zoning code. <sup>28</sup> A zoning enforcement officer, appointed by the legislative body in towns and villages and by the mayor in cities, <sup>29</sup> has the primary responsibility for enforcement of the zoning code, while the building inspector is the administrator of the building code. <sup>30</sup> In this case, the building inspector "withholds permits if the zoning official's approval has not been obtained, but he is not obliged to make a separate determination of the question whether a proposed building is consistent with the zoning restrictions." <sup>31</sup> For the purposes of this article, the term zoning enforcement officer will be used to refer to the municipal official charged with enforcing the zoning code, unless otherwise specified by a municipality.

Although there is some variety among municipalities, the responsibilities of the zoning enforcement officer are generally "to prepare or acquire forms necessary to properly administer the zoning law, issue zoning permits, conduct inspections and investigations, issue a zoning certificate of compliance or occupancy, maintain records of all administrative actions and papers, and enforce the zoning law." <sup>32</sup> Most municipal ordinances state that a building permit may not be issued unless the proposed structure will comply with all of the requirements of the zoning code. <sup>33</sup> After construction is completed, an inspection must be made before a certificate of occupancy is issued in order to ensure that construction was completed according to the zoning code and any other conditions imposed by the municipality. <sup>34</sup> In order to fulfill these responsibilities, the zoning enforcement officer must be given clear authority in the local zoning law. <sup>35</sup> Because the zoning enforcement officer has no

authority to alter the zoning law, he must apply it "as it is written."<sup>36</sup> Although he can ask the legislative body to amend the requirements of the zoning law, he "must deny a permit whenever he is in doubt about a proposal's legality, or about how the zoning law applies to the particular case."<sup>37</sup>

As an alternative, some towns specifically provide in their zoning code that the zoning enforcement officer may make an appeal to the Board of Appeals if he is uncertain of the interpretation of the code.<sup>38</sup> The Town of Harrison, New York, for example, provides that when the Building Inspector is "in doubt as to the meaning or intent of any provision of [the] chapter . . . or as to the propriety of issuing a building permit or a certificate of occupancy . . . he shall appeal the matter to the Board of Appeals."<sup>39</sup> Once a decision has been rendered by the zoning enforcement officer, the landowner also has an opportunity to appeal the decision of the zoning enforcement officer to the Zoning Board of Appeals.<sup>40</sup>

With this understanding of the duties of the official charged with zoning enforcement understood, the procedure for enforcement can be explored.

## IV PROCEDURE FOR ENFORCEMENT

### A. Discovery and Inspection

Violations may pertain to the actual use of land and buildings or structures that do not comply with the zoning law. For example, a two family house that is constructed in a district zoned for single family homes is a violation of the zoning code. Similarly, a house that is in a residential district but is used for commercial purposes may be in violation, depending upon the provisions for accessory uses in the municipality. In addition, if a site plan application is approved by the appropriate municipal board, but conditions are placed on the approval, failure to adhere to those conditions would constitute a zoning violation. Enforcement generally begins when the zoning enforcement officer discovers a suspected violation or such violation is discovered by another municipal official or a local resident and is reported to the zoning enforcement officer.<sup>41</sup> Many municipalities use a system of receiving complaints from citizens in order to encourage and improve citizen participation.<sup>42</sup> Furthermore, a follow-up to the complaint is encouraged to acknowledge receipt of the complaint and to inform the citizen of what action, if any, is being taken.<sup>43</sup>

Once a violation is credibly alleged, an enforcement officer will seek to inspect the subject premises to determine whether a violation actually exists.<sup>44</sup> Section 138 of the Town Law states that the building inspector "shall have the right to enter and inspect at any time any building, structure or premises and to perform any other act necessary for the enforcement of such codes, ordinances, rules or regulations . . ."<sup>45</sup> While the General City Law does not have a provision that is identical to section 138 of the Town Law, section 20(23) authorizes cities "[t]o exercise all powers necessary and proper for carrying into execution the powers granted to the city."<sup>46</sup> In addition, although it is less clear whether this is meant to give authority for

inspection, section 20(21) authorizes the city "[t]o investigate and inquire into all matters of concern to the city or its inhabitants . . ."<sup>47</sup> The Village Law does not have a specific provision for inspections either, but states in section 7-714 that the village authorities may take "any appropriate action" to enforce the zoning law.<sup>48</sup> In order for the zoning enforcement officer to have authority to enter the premises for the purposes of inspection, "[t]owns and villages must specifically empower the officer to enter onto private property."<sup>49</sup> In addition, a search warrant must be obtained unless the landowner gives consent or there is an emergency situation.<sup>50</sup>

### B. Notifications of Violation

After an inspection, if a violation is confirmed, the zoning enforcement officer must informally notify the violator through a Notice of Apparent Violation.<sup>51</sup> This type of informal notification may often be required by a municipality because it serves as documentation that the zoning enforcement officer acted properly.<sup>52</sup> In addition, many municipalities require the zoning enforcement officer to report to the legislative body on all complaints that are filed and all enforcement actions that are taken.<sup>53</sup> The letter has to clearly identify the violation and may inform the violator that it is the only notification that he will receive.<sup>54</sup> The zoning enforcement officer usually has discretion in setting a time period for abatement of the violation, but must specify that time period in the letter.<sup>55</sup> Often, the violator will correct the violation as a result of this notification, particularly if the violator was not even aware of such violation.<sup>56</sup>

If the violation is not corrected, the zoning enforcement officer will send a more formal Notice of Violation.<sup>57</sup> At this point, the officer is authorized to take affirmative steps to enjoin the violation.<sup>58</sup> The zoning enforcement officer can revoke the building permit or the certificate of occupancy.<sup>59</sup> However, unless the proposed use constitutes a nuisance, the property owner must be given prior notice of the revocation and must have an opportunity to be heard.<sup>60</sup> The zoning enforcement officer is also subject to other limitations. First, a legally issued permit cannot be revoked if the landowner has acquired vested rights,<sup>61</sup> which will be discussed in Section V of this article (in next month's issue). Second, if the property owner brings an action challenging the revocation, the court will review the zoning enforcement officer's actions to determine if she acted arbitrarily or capriciously.<sup>62</sup>

The zoning enforcement officer also may refuse to issue new permits to a person in violation until all violations are corrected.<sup>63</sup> In the case of a construction project, the zoning enforcement officer may issue a stop work order to halt any work and prevent any additional investment on the part of the landowner, until it is in compliance with all zoning and land use regulations.<sup>64</sup> Authorization to issue a stop work order must be clearly stated in the zoning code.<sup>65</sup> This measure is extremely beneficial to the municipality in avoiding a defense of vested rights, which will be discussed subsequently as a defense to an enforcement action. A cease and desist order may also be issued to compel a property owner to correct an existing violation.<sup>66</sup> In proceeding with any of these alternatives, the zoning enforcement officer

should keep precise records in order to show that the proper procedures were followed in the event that a criminal or civil proceeding is required or should the property owner seek judicial review of the actions of the zoning enforcement officer.<sup>67</sup>

### C. The Property Owner's Options

If the property owner decides not to correct the violation, there are several options available. First, an appeal can be made to the Zoning Board of Appeals.<sup>68</sup> Upon application by the violator, the Zoning Board of Appeals has the authority to affirm, reverse or modify the decision of the zoning enforcement officer and, in reviewing the decision, assumes the authority possessed by the zoning enforcement officer.<sup>69</sup> Second, an application can be made to the Zoning Board of Appeals for a zoning interpretation or an area or use variance.<sup>70</sup> This option is required, in part, because the zoning enforcement officer does not have interpretive power.<sup>71</sup> Third, an application can be made to the legislative body of the municipality to obtain a zoning amendment.<sup>72</sup> Finally, after all other possible alternatives have been exhausted, an appeal can be made to the Supreme Court under Article 78 of the CPLR.<sup>73</sup>

### D. The Zoning Enforcement Officer's Options

When a violation is not corrected, the zoning enforcement officer has the option of bringing a civil, criminal or injunctive action.<sup>74</sup> Courts have held that the initiation of one such action does not bar initiation of another.<sup>75</sup> Nonetheless, each type of action requires specific procedures and may require specific provisions within the zoning code.<sup>76</sup>

### E. Criminal Actions

Authority to initiate a criminal action against a person in violation of the zoning code is not derived from the state zoning enabling legislation for cities and villages.<sup>77</sup> Rather, "general statutes authorize cities to impose penalties, forfeitures and imprisonment for ordinance violations, and this statutory power has been held to authorize cities to provide for criminal penalties for zoning offenses."<sup>78</sup> Village Law section 20-2006 authorizes villages to impose penalties for violations of ordinances.<sup>79</sup> This type of action is considered a quasi-criminal proceeding and has been successfully used by villages to enforce the zoning law.<sup>80</sup> Unlike villages and cities, towns are explicitly authorized by section 268 of the Town Law to bring a criminal suit.<sup>81</sup>

A criminal action begins with the filing of an Information and Supporting Deposition.<sup>82</sup> The Information consists of the accusatory section in which the violation is stated along with the time, date and place of the violation.<sup>83</sup> A second section "outlines in detail the facts relied on for establishing the violation."<sup>84</sup> The third section is an affirmation of the zoning enforcement officer that the information in the document is true.<sup>85</sup> The Supporting Deposition is intended to add additional information and may include statements of persons with knowledge of the violation.<sup>86</sup> The accusatory section of the Information must be sufficient on its face.<sup>87</sup> According to section 100.40 of New York Criminal Procedure Law, this means that:

[t]he allegations of the factual part of the Information, together with those of any supporting depositions which may accompany it, provide reasonable cause to believe that the defendant committed the offense charged in the accusatory part of the information; and [n]on-hearsay allegations of the factual part of the Information and/or of any supporting deposition establish, if true, every element of the offense charged and the defendant's commission thereof."<sup>88</sup>

When the Information and Supporting Deposition are filed, the court will issue a summons requiring the person in violation to appear in court.<sup>89</sup> If the defendant fails to appear the court may issue an arrest warrant.<sup>90</sup> Because this is a lengthy process, some municipalities, through the legislative body, will authorize the zoning enforcement officer to issue an appearance ticket pursuant to Municipal Home Rule Law Article 2, section 10(4)(a) and Criminal Procedure Law section 150.20(3).<sup>91</sup> If the zoning enforcement officer is so authorized, he can "issue an appearance ticket to the violator immediately, and then file the information and complaint letter with the local justice."<sup>92</sup> The appearance ticket directs an individual to appear in criminal court at a designated time and alleges the commission of an offense.<sup>93</sup> If the defendant fails to appear in court, after an accusatory instrument has been filed with the court, a summons or an arrest warrant may be issued by the court pursuant to section 150.60 of Criminal Procedure Law.<sup>94</sup>

The responsibility for bringing a criminal action against a person in violation of the zoning law is, in most cases, delegated to the municipal attorney by the district attorney.<sup>95</sup> The standard of proof, as with all criminal proceedings, is that all elements of the charge must be proved beyond a reasonable doubt.<sup>96</sup> Difficulties often arise in establishing the duration of the violation for purposes of assessing a fine. Town and Village Laws provide for various fines based on their duration.<sup>97</sup> In addition, there are varying fines for first offenses and repeat offenses.<sup>98</sup> In establishing the duration of a violation, the municipal attorney will generally try to establish that a violation existed on a certain date and at specific dates thereafter. If the building inspector periodically observed the violation and assumed that the violations also existed between those periods the attorney must ask the court to draw an inference that the violation existed for the entire length of time. However, a court will generally be unwilling to do this in a criminal prosecution.<sup>99</sup> The New York Court of Appeals has held that "[i]n a criminal case, [the court] cannot guess or surmise at what might or must have been."<sup>100</sup> Rather, the burden is on the prosecution to establish beyond a reasonable doubt "every fact essential to the conviction of a defendant."<sup>101</sup> Furthermore, in *People v. Multari*, the court held that the defendant "could not be convicted of continuing violations not specifically charged in the informations."<sup>102</sup> Because the information must include a factual part which outlines the "facts relied on for establishing the violation"<sup>103</sup> as well as an affirmation that the document is true,<sup>104</sup> the only violations that should appear in the information are those that are actually observed by the enforcement officer.

### F. Civil Proceedings

Civil proceedings appear to be the more common method for

enforcing zoning and land use regulations.<sup>105</sup> A municipality may seek an injunction to compel compliance or restrain the violation.<sup>106</sup> State enabling legislation explicitly authorizes the use of an injunctive action for cities.<sup>107</sup> Legislation applicable to villages and towns provide that a municipality may "institute any appropriate action or proceedings to prevent . . . restrain, correct or abate [a] violation."<sup>108</sup> An injunction is considered an appropriate action' to prevent or correct a violation.<sup>109</sup> While a municipality seeking injunctive relief does not have to show public injury or the "nonexistence of an adequate remedy at law" the municipality must show that "it has a likelihood of ultimate success on the merits, and that the equities are balanced in its favor."<sup>110</sup>

Civil penalties, however, can only be assessed if they are specifically provided for in the zoning code.<sup>111</sup> The fact that criminal fines are authorized does not confer authority on the municipality to assess civil penalties.<sup>112</sup> In *Town of Solon v. Clark*, the Appellate Division held that section 268 of the Town Law authorized only criminal fines and imprisonment and civil proceedings to prevent further violations, but not civil penalties.<sup>113</sup> However, the court held that it would be proper for a municipality to "enact a provision in its zoning ordinance authorizing the imposition of a monetary civil penalty for zoning violations *in addition to* other remedies."<sup>114</sup>

Municipalities are not exclusively authorized to enforce the zoning code. Citizen suits are permitted as well, with limitations. Specifically, a citizen may not bring an action to compel enforcement by a municipal official since enforcement is a

discretionary duty.<sup>115</sup> One of the reasons for such a holding is the limited resources of a municipality and the difficulty that this would cause if zoning enforcement officers could be compelled to enforce all regulations. To alleviate this problem, New York courts have held that certain citizens may bring an injunctive action against a person who is in violation of zoning or land use regulations.<sup>116</sup> In *Marcus v. Village of Mamaroneck*, the New York Court of Appeals held that "[t]he provision [in the village zoning ordinance] that an official of the village shall enforce the zoning ordinance does not prevent a private property owner who suffers special damages from maintaining an action for redress."<sup>117</sup> The rationale behind such a decision is based on the fact that there is a difference between an action in which a municipality seeks to compel compliance with its zoning code and an action in which a landowner seeks to compel compliance because the violation is having an adverse effect on his property.<sup>118</sup> Furthermore, because the landowner cannot compel action on the part of the municipality,<sup>119</sup> there must be another remedy available when his land is adversely affected. In order to show that special damages have occurred, the landowner must show that he has suffered damages "different in kind and degree from the community generally."<sup>120</sup> In addition, the landowner must show that "the alleged injury falls within the zone of interests sought to be promoted or protected by the statute."<sup>121</sup> However, close proximity of the landowner's property to the property of the person in violation of the zoning law may be sufficient to confer standing because the special damages may be inferred from the proximity.<sup>122</sup>

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*to initiate an evaluation of zoning enforcement, a subject remarkably underexamined in legal literature. Ms. Goldberger would like to thank Professor John R. Nolon, Director of the Land Use Law Center, for his guidance and contributions to this paper.*

<sup>1</sup> See John R. Nolon, *Well Grounded* 37 (1999).

<sup>2</sup> John R. Nolon, *Well Grounded* 443 (1999).

<sup>3</sup> See N.Y. Town Law § 261; N.Y. Village Law § 7-700; N.Y. Gen. City Law § 20. See also N.Y. Mun. Home Rule Law § 10. Section 10 states that "every local government . . . shall have the power to adopt and amend local laws . . . relating to the . . . safety, health and well-being of persons or property therein." *Id.*

<sup>4</sup> N.Y. Town Law § 261. See N.Y. Village Law § 7-700; N.Y. Gen. City Law § 20.

<sup>5</sup> See John R. Nolon, *Well Grounded* 402 (1999).

<sup>6</sup> See John R. Nolon, *Well Grounded* 402 (1999). See *Kravetz v. Plenge*, 84 A.D.2d 422, 426, 446 N.Y.S.2d 807, 810 (4th Dept. 1982) (the burden of demonstrating unconstitutionality must be overcome beyond a reasonable doubt).

<sup>7</sup> *Kravetz v. Plenge*, 84 A.D.2d 422, 426, 446 N.Y.S.2d 807, 811 (4th Dept. 1982).

<sup>8</sup> See N.Y. Town Law § 268. See also N.Y. Village Law § 7-714; N.Y. Gen. City Law § 20. Town Law section 268 states that "[t]he town board may provide by local law or ordinance for the enforcement of this article and of any local law, ordinance or regulation made thereunder." This section further provides for fines and/or imprisonment for convictions. *Id.*

<sup>9</sup> See N.Y. Town Law § 135. Section 135 of Town Law further states that "for the purpose of conferring jurisdiction upon courts and judicial officers . . . such violations shall be deemed misdemeanors and for such purpose only all provisions of law relating to misdemeanors shall apply to such violations." *Id.*

<sup>10</sup> N.Y. Village Law § 7-714.

<sup>11</sup> N.Y. Gen. City Law § 20.

- <sup>12</sup> See N.Y. Town Law § 268. See also N.Y. Village Law § 20-2006.
- <sup>13</sup> N.Y. Town Law § 268. See N.Y. Village Law § 7-714.
- <sup>14</sup> N.Y. Town Law § 268. *But see* *Forget v. Raymer*, 65 A.D.2d 953, 954, 410 N.Y.S.2d 483, 484 (4th Dept. 1978). In *Forget*, the court held that "[i]n a taxpayer's action to enforce compliance with the zoning law upon failure of the town officers to do so, the taxpayer plaintiffs have no greater right to demand compliance than do the town officials." In this case, the town had declared the defendant's use legal and nonconforming and thus could not institute an action to enjoin such use. Because the town was estopped, the taxpayer plaintiffs were estopped also. *Id.*
- <sup>15</sup> N.Y. Gen. City Law § 20.
- <sup>16</sup> See N.Y. Town Law § 138. Town Law section 138 states that "[t]he town board may appoint a building inspector [who] shall have charge of the enforcement of such codes, ordinances, rules and regulations of the town and of the zoning ordinance of the town." *Id.*
- <sup>17</sup> See *id.*
- <sup>18</sup> See *Town of Solon v. Clark*, 97 A.D.2d 602, 468 N.Y.S.2d 201 (3d Dept. 1983).
- <sup>19</sup> See Robert M. Anderson, *American Law of Zoning* § 31.02 (3d ed. 1986). See also *Laurel Hollow v. Laverne, Inc.*, 24 A.D.2d 615, 262 N.Y.S.2d 622 (2d Dept. 1965).
- <sup>20</sup> See New York Dept. of State, *Zoning Enforcement*, June 1998, at 4.
- <sup>21</sup> See *Town of Orangetown v. Magee*, 88 N.Y.2d 41 (1996).
- <sup>22</sup> See *Town of Orangetown v. Magee*, 88 N.Y.2d 41 (1996).
- <sup>23</sup> 88 N.Y.2d at 53.
- <sup>24</sup> See Jeffrey P. Mans, *Enforcement of Municipal Land Use Controls*, in *Basics of Administration and Enforcement of Land Use Controls* 189 (New York State Bar Association 1999).
- <sup>25</sup> See N.Y. Town Law §§ 261, 268; N.Y. Village Law §§ 7-700, 7-714; N.Y. Gen. City Law § 20.
- <sup>26</sup> See Robert M. Anderson, *American Law of Zoning* § 19.05 (3d ed. 1986).
- <sup>27</sup> See Robert M. Anderson, *American Law of Zoning* § 19.05 (3d ed. 1986).
- <sup>28</sup> See Robert M. Anderson, *American Law of Zoning* § 19.05 (3d ed. 1986).
- <sup>29</sup> See New York Dept. of State, *Zoning Enforcement*, June 1998, at 4.
- <sup>30</sup> See Robert M. Anderson, *American Law of Zoning* § 19.05 (3d ed. 1986).
- <sup>31</sup> Robert M. Anderson, *American Law of Zoning* § 19.05 (3d ed. 1986).
- <sup>32</sup> New York Dept. of State, *Zoning Enforcement*, June 1998, at 4. See *Mamaroneck, N.Y.*, *Zoning Code* ch. 342, § 342-86 (1998).
- <sup>33</sup> See *Clinton, N.Y.*, *Zoning Law* art. 7, § 7.4(D) (1991). See also *White Plains, N.Y.*, *Zoning Ordinance* § 11.2 (1981).
- <sup>34</sup> See Robert M. Anderson, *American Law of Zoning* § 19.03 (3d ed. 1986).
- <sup>35</sup> See New York Dept. of State, *Zoning Enforcement*, June 1998, at 4.
- <sup>36</sup> New York Dept. of State, *Zoning Enforcement*, June 1998, at 4.
- <sup>37</sup> New York Dept. of State, *Zoning Enforcement*, June 1998, at 4.
- <sup>38</sup> See *Harrison, N.Y.*, *Zoning Ordinance* art. XII, § 235-69 (1986).
- <sup>39</sup> *Harrison, N.Y.*, *Zoning Ordinance* art. XII, § 235-69 (1986).
- <sup>40</sup> See N.Y. Town Law § 267-b. See also N.Y. Village Law § 7-712-b; N.Y. Gen. City Law § 81-a.
- <sup>41</sup> See New York Dept. of State, *Zoning Enforcement*, June 1998, at 5.
- <sup>42</sup> See *Clinton, N.Y.*, *Zoning Law* art. 7, § 7.2 (1991). This section specifies that all complaints must be made to the Zoning Enforcement Officer. See also *Harrison, N.Y.*, *Zoning Ordinance* art. XII, § 235-75 (1986) (providing that any person may file a complaint with the Building Inspector regarding a violation of the zoning chapter and that all complaints must be investigated by the Building Inspector and action taken within three days).
- <sup>43</sup> See *Clinton, N.Y.*, *Zoning Law* art. 7, § 7.2 (1991). The Town specifies that "[i]f the complaint is made in writing, the Zoning Enforcement Officer shall respond to the complainant in writing within thirty days, acknowledging the complaint, and stating the disposition of pending action on the complaint." *Id.*
- <sup>44</sup> See N.Y. Town Law § 138; N.Y. Village Law § 7-714; N.Y. Gen. City Law § 20(23).
- <sup>45</sup> N.Y. Town Law § 138.
- <sup>46</sup> N.Y. Gen. City Law § 20(23).
- <sup>47</sup> N.Y. Gen. City Law § 20(21).
- <sup>48</sup> N.Y. Village Law § 7-714.
- <sup>49</sup> New York Dept. of State, *Zoning Enforcement*, June 1998, at 5. See *Greenville, N.Y.*, *Zoning Code* ch. 205, § 205-74 (1999); *Fishkill, N.Y.*, *Zoning Code* ch. 150, § 150-76(B) (1997).
- <sup>50</sup> See *In re Barone*, 392 N.Y.S.2d 953, 955 (Sup. Ct. Orange Co. 1976) (citing *People v. Laverne*, 14 N.Y.2d 304, 251 N.Y.S.2d 452 (1964)).
- <sup>51</sup> See New York Dept. of State, *Zoning Enforcement*, June 1998, at 6. See also *Clinton, N.Y.*, *Zoning Law* art. 7, § 7.2 (1991); *Harrison, N.Y.*, *Zoning Ordinance* art. XII, § 235-75(B) (1986).
- <sup>52</sup> See New York Dept. of State, *Zoning Enforcement*, June 1998, at 6.
- <sup>53</sup> See *Clinton, N.Y.*, *Zoning Law* art. 7, § 7.2 (1991). The Town of Clinton requires the zoning enforcement officer to keep records of all violations of the zoning code, including all actions taken against such violations, and to make a report to the Town Board every three months detailing the status of all violations and all actions taken to terminate the violation. *Id.*
- <sup>54</sup> See New York Dept. of State, *Zoning Enforcement*, June 1998, at 6.
- <sup>55</sup> See New York Dept. of State, *Zoning Enforcement*, June 1998, at 6. See also *Harrison, N.Y.*, *Zoning Ordinance* art. XII, § 235-75(B) (1986); *Clinton, N.Y.*, *Zoning Law* art. 7, § 7.2 (1991).
- <sup>56</sup> See New York Dept. of State, *Zoning Enforcement*, June 1998, at 6.
- <sup>57</sup> See New York Dept. of State, *Zoning Enforcement*, June 1998, at 6.
- <sup>58</sup> See New York Dept. of State, *Zoning Enforcement*, June 1998, at 6. See also *Dover, N.Y.*, *Zoning Law* art. 8, § 8.4.2(C) (1993).
- <sup>59</sup> See *Clinton, N.Y.*, *Zoning Law* art. 7, §§ 7.4(E), 7.5(F) (1991). See also *Milan, N.Y.*, *Zoning Code* ch. 200, § 200-53(J) (1994).
- <sup>60</sup> See *Tafnet Realty Corp. v. City of New York*, 460 N.Y.S.2d 729, 730 (Sup. Ct. New York Co. 1983).
- <sup>61</sup> See *Reichenbach v. Windward at Southampton*, 364 N.Y.S.2d 283, 288 (Sup. Ct. Suffolk Co. 1975).
- <sup>62</sup> See *Town of Orangetown v. Magee*, 88 N.Y.2d 41 (1996). See also *Knispel Construction Co., v. Missavage*, 102 A.D.2d 1007, 1008, 477 N.Y.S.2d 883, 884 (3d Dept. 1984).
- <sup>63</sup> See New York Dept. of State, *Zoning Enforcement*, June 1998, at 6. See also *Clinton, N.Y.*, *Zoning Law* art. 7, § 7.4(D) (1991).
- <sup>64</sup> See New York Dept. of State, *Zoning Enforcement*, June 1998, at 6. See also *Clinton, N.Y.*, *Zoning Law* art. 7, § 7.2(F) (1991); *Milan, N.Y.*, *Zoning Code* ch. 200, § 200-53(I) (1994).
- <sup>65</sup> See New York Dept. of State, *Zoning Enforcement*, June 1998, at 6.
- <sup>66</sup> See N.Y. Town Law § 267-b; N.Y. Village Law § 7-712-b; N.Y. Gen. City Law § 81-a.
- <sup>67</sup> See New York Dept. of State, *Zoning Enforcement*, June 1998, at 6. See also *Greenville, N.Y.*, *Zoning Code* ch. 205, § 205-75 (1999); *Clinton, N.Y.*, *Zoning Law* art. 7, § 7.2(I) (1991).

- <sup>68</sup> See N.Y. Town Law § 267-b; N.Y. Village Law § 7-712-b; N.Y. Gen. City Law § 81-b.
- <sup>69</sup> See N.Y. Town Law § 267-b; N.Y. Village Law § 7-712-b; N.Y. Gen. City Law § 81-b.
- <sup>70</sup> See N.Y. Town Law § 267-b ; N.Y. Village Law § 7-712-b ; N.Y. Gen. City Law § 81-b .
- <sup>71</sup> See New York Dept. of State, Zoning Enforcement, June 1998, at 7.
- <sup>72</sup> See New York Dept. of State, Zoning Enforcement, June 1998, at 6.
- <sup>73</sup> See New York Dept. of State, Zoning Enforcement, June 1998, at 7. See also N.Y. Town Law § 267-c; N.Y. Village Law § 7-712-c; N.Y. General City Law § 81-c.
- <sup>74</sup> See *Town of Southampton v. Sendlewski*, 156 A.D.2d 669, 549 N.Y.S.2d 434, 436 (2d Dept. 1989). See also *Town of Solon v. Clark*, 97 A.D.2d 602, 468 N.Y.S.2d 201 (3d Dept. 1983); *Town of Islip v. Clark*, 90 A.D.2d 500, 454 N.Y.S.2d 893 (2d Dept. 1982).
- <sup>75</sup> See *Town of Solon v. Clark*, 97 A.D.2d 602, 468 N.Y.S.2d 201 (3d Dept. 1983).
- <sup>76</sup> See *Town of Solon v. Clark*, 97 A.D.2d 602, 468 N.Y.S.2d 201 (3d Dept. 1983).
- <sup>77</sup> See 12 N.Y. Jur. 2d *Buildings, Zoning, and Land Controls* § 422 (1996).
- <sup>78</sup> 12 N.Y. Jur. 2d *Buildings, Zoning, and Land Controls* § 422 (1996). See N.Y. Gen. City Law § 20(22).
- <sup>79</sup> N.Y. Village Law § 20-2006.
- <sup>80</sup> See N.Y. Village Law § 20-2006. See 12 N.Y. Jur. 2d *Buildings, Zoning, and Land Controls* § 422 (1996).
- <sup>81</sup> See N.Y. Town Law § 268. Section 268 states that "[f]or the purpose of conferring jurisdiction upon courts and judicial officers generally, violations of this article or of such ordinance or regulation shall be deemed misdemeanors and for such purpose only all provisions of law relating to misdemeanors shall apply to such violations." *Id.*
- <sup>82</sup> See N.Y. Crim. Proc. Law § 100.05.
- <sup>83</sup> See New York Dept. of State, Zoning Enforcement, June 1998, at 8. See also N.Y. Crim. Proc. Law §§ 1.20, 100.10, 100.15.
- <sup>84</sup> New York Dept. of State, Zoning Enforcement, June 1998, at 8. See N.Y. Crim. Proc. Law § 100.15.
- <sup>85</sup> See New York Dept. of State, Zoning Enforcement, June 1998, at 8. See also N.Y. Crim. Proc. Law § 100.15.
- <sup>86</sup> See N.Y. Crim. Proc. Law § 100.20.
- <sup>87</sup> See N.Y. Crim. Proc. Law §§ 140.45, 150.50. Section 140.45 states that "[i]f a local criminal court accusatory instrument . . . is not sufficient on its face . . . and if the court is satisfied that on the basis of the available facts or evidence it would be impossible to draw and file an accusatory instrument which is sufficient on its face, it must dismiss such accusatory instrument and discharge the defendant." *Id.*
- <sup>88</sup> N.Y. Crim. Proc. Law § 100.40.
- <sup>89</sup> See N.Y. Crim. Proc. Law § 120.20.
- <sup>90</sup> See N.Y. Crim. Proc. Law § 130.50.
- <sup>91</sup> See *Dover, N.Y.*, Zoning Law, art. 8, § 8.4-3 (1993). See also N.Y. Mun. Home Rule Law art. 2, § 10(4)(a); N.Y. Crim. Proc. Law § 150.20(3), which provides that "[a] public servant other than a police officer, who is specially authorized by state law or local law enacted pursuant to the provisions of the municipal home rule law to issue and serve appearance tickets with respect to designated offenses may in such cases issue and serve upon a person an appearance ticket when he has reasonable cause to believe that such person has committed a crime ." *Id.*
- <sup>92</sup> New York Dept. of State, Zoning Enforcement, June 1998, at 8. See N.Y. Crim. Proc. Law § 150.50.
- <sup>93</sup> See N.Y. Crim. Proc. Law § 150.10. See also Jeffrey P. Mans, *Enforcement of Municipal Land Use Controls, in Basics of Administration and Enforcement of Land Use Controls* 185 (New York State Bar Association 1999). An appearance ticket must be personally served upon the defendant by an authorized public servant. It can be issued and served by a building inspector if authorized by local law. *Id.*
- <sup>94</sup> See Jeffrey P. Mans, *Enforcement of Municipal Land Use Controls, in Basics of Administration and Enforcement of Land Use Controls* 185 (New York State Bar Association 1999). See also N.Y. Crim. Proc. Law § 150.60.
- <sup>95</sup> See New York Dept. of State, Zoning Enforcement, June 1998, at 8.
- <sup>96</sup> See N.Y. Crim. Proc. Law § 70.20.
- <sup>97</sup> See N.Y. Town Law § 268; N.Y. Village Law § 20-2006.
- <sup>98</sup> See N.Y. Town Law § 268; N.Y. Village Law § 20-2006.
- <sup>99</sup> See *People v. Sacks*, 276 N.Y. 321 (1938). See also *People v. Matthews*, 155 N.Y.S.2d 873 (N.Y. Co. Ct. 1956).
- <sup>100</sup> *People v. Sacks*, 276 N.Y. 321, 328 (1938).
- <sup>101</sup> *People v. Matthews*, 155 N.Y.S.2d 873, 875 (N.Y. Co. Ct. 1956).
- <sup>102</sup> *People v. Multari*, 517 N.Y.S.2d 374, 378 (N.Y. Co. Ct. 1987).
- <sup>103</sup> N.Y. Crim. Proc. Law § 100.15.
- <sup>104</sup> See N.Y. Crim. Proc. Law § 100.15.
- <sup>105</sup> See Robert M. Anderson, *American Law of Zoning* § 31.01 (3d ed. 1986). Criminal proceedings play a smaller role in the enforcement of zoning and planning regulations than is generally true in the enforcement of municipal ordinances. *Id.*
- <sup>106</sup> See N.Y. Town Law § 268(2); N.Y. Village Law § 7-714; N.Y. General City Law § 20(22).
- <sup>107</sup> See N.Y. General City Law § 20(22).
- <sup>108</sup> N.Y. Town Law § 268(2); N.Y. Village Law § 7-714.
- <sup>109</sup> See *Little Joseph Realty, Inc. v. Town of Babylon*, 41 N.Y.2d 738, 744 (1977).
- <sup>110</sup> *Town of Southampton v. Sendlewski*, 156 A.D.2d 669, 670, 549 N.Y.S.2d 434, 435 (2d Dept. 1989).
- <sup>111</sup> See *Town of Solon v. Clark*, 97 A.D.2d 602, 468 N.Y.S.2d 201 (3d Dept. 1983).
- <sup>112</sup> See *Town of Solon v. Clark*, 97 A.D.2d 602, 468 N.Y.S.2d 201 (3d Dept. 1983).
- <sup>113</sup> *Town of Solon v. Clark*, 97 A.D.2d 602, 468 N.Y.S.2d 201 (3d Dept. 1983).
- <sup>114</sup> *Town of Solon v. Clark*, 97 A.D.2d 602, 468 N.Y.S.2d 201 (3d Dept. 1983) (emphasis added). See *Dover, N.Y.*, Zoning Law art. 8, § 8.4.4(B) (1993).
- <sup>115</sup> See *Fried v. Fox*, 49 A.D.2d 877, 373 N.Y.S.2d 197 (2d Dept. 1975) (mandamus is a drastic and extraordinary remedy and lies only to compel the performance of an official duty clearly imposed by law where there is no other adequate specific remedy and where the duty is positive and not discretionary). The court further held that the enforcement of zoning ordinances must, of necessity, be a discretionary duty. See also *Manuli v. Hildenbrandt*, 144 A.D.2d 789, 534 N.Y.S.2d 763, 764 (3d Dept. 1988). *Id.*
- <sup>116</sup> See *Little Joseph Realty, Inc. v. Town of Babylon*, 41 N.Y.2d 738, 741 (1977).
- <sup>117</sup> *Marcus v. Village of Mamaroneck*, 283 N.Y. 325 (1940).
- <sup>118</sup> See *Little Joseph Realty, Inc. v. Town of Babylon*, 41 N.Y.2d 738, 741-42 (1977). The court, in *Little Joseph*, found that "the private property owner is pursuing more than a civic interest in law enforcement; he is vindicating a discrete, separate identifiable interest of his own." *Id.*
- <sup>119</sup> See *Fried v. Fox*, 49 A.D.2d 877, 373 N.Y.S.2d 197 (2d Dept. 1975).
- <sup>120</sup> *Sun Brite Car Wash, Inc. v. Board of Zoning Appeals of the Town of North Hempstead*, 69 N.Y.2d 406, 413 (1987).

<sup>121</sup> *Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 628 N.Y.S.2d 375, 377 (2d Dept. 1995).

<sup>122</sup> See 12 N.Y. Jur. 2d *Buildings, Zoning, and Land Controls* § 420 (1996). Section 420 states that "the plaintiff must show that the proposed use would result in an imminent threat of irreparable injury or diminution in the value of his property." However, the harm may be inferred from the plaintiff's close proximity to the premises. See also *Sun Brite Car Wash, Inc. v. Board of Zoning and Appeals of the Town of North Hempstead*, 69 N.Y.2d 406, 414 (1987);

*Golden v. Steam Heat*, 216 A.D.2d 440, 628 N.Y.S.2d 375, 377 (2d Dept. 1995) (diminution in value, as a result of close proximity to a violation, can be presumed from the depreciation of the character of the immediate neighborhood); *Sopchack v. Guernsey*, 176 A.D.2d 403, 574 N.Y.S.2d 110, 111 (3d Dept. 1991) (landowner, whose property was within 500 feet of property in violation, had standing without proof of pecuniary gain or property depreciation, unless defendant could show interest was outside the zone of interests to be protected by the statute). *Id.*