

# **Zoning Enforcement**

**JAMES A. COON LOCAL GOVERNMENT TECHNICAL SERIES**

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## PREFACE

This publication was originally produced in 1991. It was updated in 1994 by the Jefferson County Planning Department in cooperation with the New York State Tug Hill Commission and the former St. Lawrence-Eastern Ontario Commission. It was updated in 1996 by Mark Gebo, Esq., partner in Hrabchak & Gebo, P.C., Attorneys and Counselors at Law in Watertown, New York, and in 1998 by the New York State Department of State.

## INTRODUCTION

This publication discusses the zoning enforcement process, including options for enforcement, along with the laws that authorize enforcement in the towns and villages of New York State. It does not contain specific information regarding zoning enforcement in cities, as those procedures are more appropriately referenced within individual city charters.

Section I describes the roles of various key entities including the zoning enforcement officer. It is critically important that the enforcement official understand the responsibilities of these boards. This is only a summary; for more extensive treatment of the responsibilities of these entities, the reader should consult other publications in this Technical Series. Section II outlines the steps involved in the zoning enforcement process, referencing state enabling statutes. The actual process varies among municipalities; one should always, therefore, consult local laws and officials for more specific local procedural guidance. The Appendix provides useful sample forms for local adoption.

Land use legislation may be enacted by ordinance in towns, as well as by local law in both towns and villages. For simplicity, we will refer to all such legislation as the local “zoning law”.

## LOCAL BOARDS AND OFFICERS

**The Legislative Body** – The legislative body (town board or village board of trustees) plays a major role in zoning administration and enforcement. It appoints members of the planning board,<sup>1</sup> the zoning commission (applicable in towns and villages),<sup>2</sup> the zoning board of appeals (ZBA),<sup>3</sup> and the zoning enforcement officer (ZEO).<sup>4</sup> The legislative body must approve any by-laws, rules and regulations that govern these boards and officials, as well as any procedures to be used in administering the law. Though other boards may write initial drafts of, or advise on, various land use laws and procedures, only the legislative body may enact them into law.

The legislative body has the option to enact site plan review and special permit approval.<sup>5</sup> It may choose either to perform site plan review and/or special use permit approval directly, or instead delegate one or both of these procedures to an appointed board such as the planning board or zoning board of appeals. The power to approve subdivisions can, however, only be delegated to the planning board.<sup>6</sup> The legislative body typically delegates zoning enforcement authority to its ZEO.

By delegating some of the above mentioned powers to other boards and officials, the legislative body frees up time for its other numerous responsibilities. This is a good idea, but it is important to remember that once these powers have been delegated, the legislative body cannot overrule a decision made by the ZBA, ZEO, or planning board. It may appeal such a decision, as may any other concerned citizen, but it cannot simply overrule it.

**The Zoning Enforcement Officer (ZEO)** – The ZEO is the municipality's representative in land use regulation and enforcement, and should be the primary contact for all applicants. His/her major duties usually are: 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 through the various methods discussed in this document.

The actual powers and duties of the position will vary among municipalities. They must be clearly spelled out in either the local zoning law or a separate ordinance or law providing for the enforcement of all zoning and land use laws.

The ZEO's power is limited to enforcement of the law as it is written. The ZEO has no power to modify or waive the zoning regulations even if s/he disagrees with a requirement of the regulation. When the ZEO finds that certain requirements of the zoning are inappropriate and consistently create problems for applicants, then s/he can and should propose an amendment to the legislative body. The legislative body is the only board that has the authority to make a zoning amendment, and this power cannot be delegated. The ZEO must deny a permit whenever s/he is in doubt about a project's legality, or about how the zoning law applies to the particular case. An applicant who is denied a permit can appeal to the ZBA for an interpretation of the zoning regulation, or for a variance.<sup>7</sup>

The ZEO must pursue all violations of the law without undue bias for or against a particular person, otherwise s/he will open himself or herself to lawsuits for discriminatory enforcement.<sup>8</sup>

Enforcement action can be taken whenever a zoning law or ordinance is violated, or a condition attached to an approval granted by a municipal board is not met. While the landowner can always be held responsible for a violation on his/her property, enforcement action may also be taken against other responsible parties, such as tenants and building contractors.

**The Zoning Board of Appeals (ZBA)** – The enabling statutes provide that the legislative body must appoint a ZBA whenever it initially adopts a zoning law.<sup>9</sup> The basic powers of the ZBA fall into two areas: original jurisdiction and appellate jurisdiction.<sup>10</sup>

Appellate (or appeals) jurisdiction allows an “aggrieved party” to bring an appeal of a decision of the ZEO to the ZBA for review. “Aggrieved parties” may include: the recipient of an enforcement action; an unsuccessful permit applicant; or a third party.

There are two types of appeals: an appeal seeking an interpretation of the zoning law; and an appeal seeking a zoning variance. An appeal for an interpretation simply claims that the ZEO's decision was incorrect under the zoning law, and requests the ZBA to overturn the decision. An

appeal for a variance, which can only be made by an owner following a ZEO's enforcement action or permit denial, claims that special circumstances warrant the ZBA to vary the strict terms of the zoning law.

**The Planning Board** – The planning board has an advisory role and must be aware of community needs and goals. It is concerned both with development and with the formulation of growth policies. The planning board usually advises other local boards on matters that affect the community's development.<sup>11</sup>

A planning board's powers exist solely at the legislative body's discretion. It can be given review and approval authority for special permits, subdivisions, site plans, and other land use-related laws, such as a historic district law. When given such jurisdiction, the legislative body should adopt appropriate regulations to govern the planning board's procedures. To carry out its duties, the planning board, on referral, may assist in the preparation of a comprehensive plan for development,<sup>12</sup> and make investigations, maps, reports, and recommendations dealing with local planning and development.

**The Zoning Commission** – State law provides that the legislative body must appoint a zoning commission to draft the community's initial zoning law.<sup>13</sup> If it so desires, the legislative body may appoint the existing planning board as its zoning commission. If, however, a separate zoning commission is created, it will cease to exist after the legislative body, by resolution, accepts the commission's final report and draft zoning law.

## ZONING ENFORCEMENT PROCESS

**Step 1: Report of Violation** – The zoning enforcement process begins when the ZEO becomes aware of a violation. The ZEO may discover the violation himself or herself, or it may be reported to the ZEO by a municipal official or local resident. To improve the effectiveness of citizen involvement, every local government should have an established system for taking citizen complaints. Ideally, such a system should provide that anyone may file a citizen complaint form (see Appendix 1) setting forth information about the supposed violation. If possible, the municipality should allow the citizen to file this form electronically, and to receive a response in the same manner. The form should be filed at a central location (probably the town or village clerk's office) that is well publicized.

Should an oral, perhaps anonymous, complaint, trigger an enforcement investigation? Ordinarily, such complaints should be taken seriously and investigated, whether or not the complainant has identified him/herself.

Every system of receiving citizen complaints should include follow-up. The best approach is an immediate follow-up letter (or electronic response) (see Appendix 5) that tells the citizen the complaint has been received and will be investigated as soon as possible. Barring other priorities, a good rule of thumb is that the ZEO should proceed to investigate every citizen complaint within 24 to 48 hours.

In addition to the immediate follow-up letter, the ZEO should forward a subsequent letter to the complainant (see Appendix 6) explaining the final results of the enforcement action. If no action was taken, the ZEO should explain why.

**Step 2: Investigation** – Once a possible violation has been observed or reported, the ZEO is empowered to investigate the matter, make a preliminary determination of whether or not it constitutes a violation, and take the appropriate action in the enforcement process. While some older state statutes directly grant officials the power to enter into buildings to make inspections, those statutes do not supersede constitutional protections against unreasonable search. Without the owner’s consent in a non-emergency situation, a search warrant (see Appendix 7A) is required before the ZEO may lawfully enter onto any premises that the general public is not already invited to enter.<sup>14</sup> All municipalities should, therefore, adopt provisions generally authorizing their ZEO to enter onto all premises, public or private, “consistent with constitutional safeguards and any requisite warrant”, in order to effectuate enforcement. When the ZEO is in doubt about the legality of entering private property against an owner’s will, the best advice is that s/he consult with the municipal attorney before entering the property.

Any investigation should be logged by the ZEO using an Enforcement Inspection Report (see Appendix 2) regardless of the results. This creates a record of initial inspection, and the report can be referred to for further questions or issues involving the project or matter.

**Step 3: Notification To Remedy Violations; Administrative Actions** – If a zoning violation does exist, then enforcement steps must be taken. The first step is to inform the property owner of the violation so that it can be corrected. Often, zoning violations are an oversight on the owner’s part, and simply advising him/her of the violation will resolve the matter. There are a variety of ways that a violator can be notified, and generally the situation will dictate the most appropriate method.

Usually the first attempt at notification is informal contact with the property owner to explain the violation and the potential of enforcement. The ZEO should keep a record of the contact and the results. If the owner is hard to contact, then it is advisable that a letter requesting voluntary compliance be forwarded to the property owner (see Appendix 8). The letter should clearly identify the violation and state that “...This is the only letter you will receive. If you do not correct the violation by [DATE] or contact this office and make arrangements for an extension of time, we will begin enforcement action...” It is very important that this letter be sent by certified or registered mail with a return receipt requested. This will insure that the owner receives it and will provide proof that it was received.

Many local governments require that even informal contact with landowners be documented. While a “Notice of Apparent Violation” looks formal, it does not have any great legal significance. It is simply a way to inform the landowner that s/he may be in violation of the zoning law and that s/he needs to abate or correct the violation. The landowner can be given the opportunity to discuss the case with the enforcement officer. A second, more formal letter, a “Notice of Violation - Order to Remedy” (see Appendix 9) amounts to a determination by the ZEO that a violation exists, and directs the landowner to take specific corrective action.

There are four possible administrative actions that can and should be used in conjunction with notification to prevent the landowner from continuing the violation. The first is revocation or suspension of permits directly related to the questionable activity. Second, any new permits or certificates related to the same work should be denied from the date on which the violation is first determined to exist until the matter resolved. Third, a Stop Work Order (see Appendix 10) should be issued in conjunction with such revocations/suspensions, to prevent any expansion of possibly illegal construction activities (as well as to prevent possibly fruitless additional investment by the owner) until the matter is resolved. A Stop Work Order on construction projects must be authorized in the zoning law itself. Finally, a Cease and Desist Order may be issued to halt a continuing violation other than that related to construction.

It is extremely important that the ZEO keep a record of any written administrative actions, as well as other enforcement actions that go beyond informal contact. Please consult Appendix 3 for a suggested Enforcement Action Checklist that can be used to keep track of such record-keeping. The legislative body may also want to develop a system of regular communication, whereby it is kept informed by the ZEO of all zoning violations and the administrative steps taken to remedy them.

**Step 4: The Respondent's Alternatives** – Ideally, upon being notified of the violation the respondent will revise her/his plans and actions to conform with the zoning law. But, if s/he is dissatisfied with that approach, s/he has alternatives for seeking relief: s/he can appeal the ZEO's decision and apply to the ZBA for a zoning interpretation or variance; or s/he could ask the legislative body for a zoning amendment. These alternatives provide a method for respondents to obtain relief from unreasonable restrictions of the zoning law.

The ZBA's primary function under law is to hear appeals and grant relief (if appropriate) from the strict application of the zoning law. The respondent initiates an appeal by filing a Notice of Appeal to the ZBA.<sup>15</sup> Any appeal asks the ZBA to overturn the ZEO's action, but, depending on the stance the respondent takes, the ZBA will have either of two tasks: interpretation or variance. First, the respondent may believe the ZEO's action incorrectly applies the zoning law. Even a well written zoning law has provisions that are open to interpretation. In that instance, the respondent appeals presenting a case for an interpretation in his/her favor. If the ZBA agrees with the respondent, it overturns the ZEO's decision, finds in favor of the respondent, and issues an appropriate order. It should be noted that *only* the ZBA can definitively interpret the zoning law. Neither the legislative body nor any other officer or body has that jurisdiction.

Whenever the ZBA makes a determination that interprets a provision of the zoning law, the determination should serve as precedent for any future actions involving that particular provision, until and unless the legislative body amends the provision.<sup>16</sup> Importantly, the ZEO should consider him/herself to be governed by the determination in any future enforcement actions that involve that same provision.

The second broad area of appeal involves the appeal for a variance. Here, the respondent--almost always, in this case, the owner--may agree that the law was correctly applied, but believes that the property is beset by special circumstances that warrant the grant of a variance to the strict application of the law. There are two types of variance, use and area.<sup>17</sup> A use variance

involves a request for a use of land that is prohibited by the zoning law and requires proof of “unnecessary hardship.” An area variance is a request to vary the dimensional standards, such as lot size, setbacks, sign area, or number of parking spaces. The test for an area variance does not require the owner to show hardship. Instead, the ZBA is required to engage in a “balancing of interests.”

Whenever any appeal is taken of the ZEO’s enforcement action, the appeal places into effect a *stay* against further enforcement.<sup>18</sup> This means that, from the date the Notice of Appeal is filed until the date the ZBA renders its determination, the municipality is prohibited from taking any further enforcement action. During such time the local justice court cannot hear or adjudicate the alleged violation, and the ZEO may not issue any further orders or appearance tickets. The stay may, however, be lifted in cases of imminent peril to life or property. To lift the stay, the ZEO must file a certificate of imminent peril with the ZBA.

Finally, the landowner may wish to apply for a zoning amendment. An amendment constitutes legislative relief, and can therefore only be approved by the legislative body (town or village board). Although the legislative body is not required to apply the tests that the ZBA must apply for a variance, any amendment that it adopts must be consistent with the comprehensive plan. A public hearing must be held before formal adoption of a zoning amendment.<sup>19</sup>

These alternatives are available to provide local relief from zoning restrictions as they may be applied by the enforcement officer. If the requested relief is denied, then the landowner must abide by the determination (which may include abating the violation) or appeal to the Supreme Court for judicial relief. If the owner instead continues to engage in an activity determined to be a violation, then the ZEO is free to take further enforcement action.

**Step 5: Judicial Enforcement** – While the ZEO is always empowered to seek criminal enforcement in the first instance, it may be his/her practice to undertake either informal or formal administrative action first. Nonetheless, where administrative action does not succeed in causing the owner to abate a zoning violation, then stronger enforcement methods can, and should, be used. The statutes provide for the imposition of both criminal and civil penalties, or sanctions that require abatement or removal of the violation.

**Criminal Proceedings** – Enforcement actions can be taken to the local criminal court, which can, under specific guidelines set by state law (or by a superseding local law), impose fines or imprisonment.<sup>20</sup> In New York State, zoning offenses are deemed misdemeanors for the purpose of conferring jurisdiction on the courts.

Although zoning offenses are deemed misdemeanors for jurisdictional purposes, they do not necessarily confer all the protections of misdemeanors if the imprisonment provisions are low enough to qualify for treatment as a *violation*.<sup>21</sup> The principal distinctions between treatment as a violation as opposed to treatment as a misdemeanor, are that for a violation the accused is not entitled to a jury trial or the appointment of an assigned attorney if unable to afford one of his/her own. Where imprisonment could exceed more than fifteen days, then the offense is instead considered a misdemeanor, and the aforementioned protections apply.<sup>22</sup>

To institute criminal proceedings against an accused, the ZEO must file an Information and Complaint (almost always accompanied by a Supporting Deposition) with the local justice court.<sup>23</sup> The Information and Complaint contains several parts. The first is an accusatory part that states the date, time, and place of the violation and the section of the zoning law that is at issue. Another part is factual; it outlines in detail the facts the ZEO relies on for establishing the violation. Lastly there is the attestation part, in which the ZEO affirms the information under penalties of perjury or swears to it before a notary.

The Supporting Deposition is meant to add more detail to what is in the Information and Complaint. Where a ZEO has not observed certain aspects of the situation, a Supporting Deposition should be taken from all persons with direct knowledge. The Supporting Deposition should be attached to the Information. Frequently, photographs or other documentary evidence may also be important and may be attached. The Information and Complaint must, however, on its face, contain each and every element of what must be proven to establish the violation. To assist the ZEO in determining what these elements are, we recommend the use of a Proof Chart (see Appendix 4). Once the ZEO compiles the Information and Complaint and Supporting Deposition and files them with the justice court, the local justice will then issue a Summons. A Summons is served by a police officer and requires the defendant to appear in court on a specified date.<sup>24</sup>

To streamline and perhaps shorten this procedure, we recommend the alternative use of the Appearance Ticket (see Appendix 11). The Appearance Ticket must be authorized in law by the legislative body for the ZEO to use it.<sup>25</sup> It is similar to a traffic citation in that it is issued by the enforcement officer directly to the defendant, without any documents having to be filed first with the court. It informs the accused of the section of law s/he is believed to have violated, and sets forth the court appearance date; it thereby takes the place of a Summons.<sup>26</sup> The ZEO can issue an Appearance Ticket to an alleged violator immediately, and then file the Information and Complaint and Supporting Deposition with the local court. Criminal proceedings require, of course, that the municipality prove the violation “beyond a reasonable doubt”. The ZEO and the municipality should be prepared to provide such proof in the justice court.

The Town Law provides that each week that a violation continues constitutes a new and separate offense.<sup>27</sup> This raises the possibility of imposing successive (and escalating) fines imposed for each week that a violation continues. Even so, the municipality must follow due process: it must serve the defendant with a new Information and Supporting Deposition, and Criminal Summons (or Appearance Ticket) for each week that it seeks a conviction. This will require repeated inspections of the property to assure that the violation still exists. It is possible to list more than one violation in the same Information. For example, if a ZEO has been to the property on four or five occasions over a period of two months, trying to obtain voluntary compliance, and is now seeking court action because such voluntary compliance was not forthcoming, then all four incidents may be separately listed as separate counts within one Information. The ability to get successive fines is often a valuable deterrent in obtaining voluntary compliance after the start of a court action. Further, because of the high cost of going to court on such violations, local justices can help to offset some of this expense to a municipality by imposing a high fine.

Because zoning law violations are treated as misdemeanors for jurisdictional purposes, it is the district attorney who has the primary responsibility for prosecution.<sup>28</sup> But district attorneys do not commonly become involved in local zoning code prosecutions. Accordingly, district attorneys will delegate that responsibility to village and town attorneys. This delegation should be confirmed in writing. Usually, the district attorney annually forwards a letter to the municipal attorney, containing a blanket authorization to prosecute municipal code violations. Once authorized by the district attorney to prosecute the zoning violation(s), the village or town attorney becomes an assistant district attorney for that specific purpose, and should immediately file an oath of office as such with the county clerk.<sup>29</sup>

**Civil Proceedings** – State law provides ample authority by which a local government may bring proceedings to prevent, restrain, correct, or abate violations of zoning regulations.<sup>30</sup> Temporary restraining orders and injunctions are the vehicles used to accomplish this, and are often the final enforcement step taken by a local government.

A temporary restraining order is issued by a State court justice upon a showing that there is an activity going on, or a situation present, that may well cause imminent danger to life or property. Examples might be: allegedly illegal contamination of a public water supply, or storage of highly flammable material. Issuance of a restraining order requires application by the municipal attorney directly to the court, and is issued without a hearing. It remains in effect only so long as is necessary for the court to conduct a hearing on a preliminary injunction. At that hearing, the alleged violator is accorded an opportunity to show why a preliminary injunction should not be issued.

A preliminary injunction is a court order that either prevents someone from taking an action that will violate the zoning law, or orders someone to abate or correct an ongoing violation. The preliminary injunction provides temporary relief before a full trial can be held. No showing of imminent danger need be made. The court must, however, find that there is a reasonable chance that the municipality will succeed at the full trial, and that the alleged violator will not be unduly harmed by the injunction. A preliminary injunction can be issued to restrain enforcement of the zoning law or to suspend use or construction of a building.

Following a full trial on the merits of the case, the court may issue a permanent injunction against the violator. Unless appealed to a higher court, a permanent injunction abates the violation as a final matter. It either orders the violator permanently to cease the illegal activity, or orders that certain illegal construction be removed.<sup>31</sup>

As courts can impose jail sentences and heavy fines for the violation of court orders, the injunctive power often provides a significant weapon in cases of willful and determined violators. The local government has no power on its own to issue injunctions - they can only be issued by a State court. Thus the municipal attorney should always be called in to institute the proper action.

## CONCLUSION

Effective zoning enforcement prevents or corrects violations of the zoning law, and therefore effectuates zoning's basic purposes: to protect the general health, safety and welfare of the citizens of the municipality. The zoning law is only as good as its enforcement; without proper enforcement, zoning consists merely of words on paper. Great care should therefore be taken when drafting the enforcement section of the zoning law. The authority to enforce, and the procedures for doing so, should be clearly spelled out. The ZEO should be given very specific guidelines regarding her/his powers and duties, to avoid confusion and to promote greater consistency in enforcement.

When a violation comes to the attention of the ZEO, it is critical that the enforcement process begin. In many cases, the violation results from an oversight on the landowner's part, and all that is needed is informal contact or a notice of violation. If not, the enforcement procedure provides for other administrative and judicial remedies to enforce compliance.

Written documentation and good record-keeping are also critical elements of the enforcement process. The ZEO best accomplishes this by using standardized forms that the legislative body adopts. Many sample forms are included for guidance, in the Appendix of this publication.