THE PLANNER’S BAR

Balancing Legal Risk Aversion & Planning Best Practices
YOUR COUNSEL

Molly Gaudioso, AICP
PLANNER, BARTON & LOGUIDICE

Corey Auerbach
PARTNER, BARCLAY DAMON

Patrick Gooch
PLANNER, MONROE COUNTY
WHAT’S ON TAP?

A.K.A. The Agenda

1. The Who & What

2. Planning & Legal Perspectives

3. Nexus of Planning & Land Use Law

TASTING MENU

FOR HERE

- Have a macro level conversation on the intersection of planning and municipal law
- Develop a strong understanding of legal and planning perspectives and the common ground between them
- Hear about your experiences with municipal attorneys (good and bad) and assess alternatives for future success
- Discuss how to be creative with legally sound tools for better results

TO GO

- Confidence to defend good practice in the face of “old school” legal opinions
- Ability to assess risk and certainty in land use regulations
- Skills to develop a variety of regulatory tools that are manageable, defensible, and facilitate good investment
- Ability to find balance between guidance and regulation; flexibility and rigidity
THE WHO & WHAT

Planning Policy & Land Use Law Administration
WHO’S AT THE HAPPY HOUR?

- Planners
- Attorneys
- Board Members
- Applicants
PLANNER TYPES

“PIE IN THE SKY”

- Transformational mentality
- Advocates for change
- Creativity over practicality / reality
- Unwilling to make concessions on approach
- Irritated with public / bureaucratic pushback
- (“planner knows best”) philosophy
PLANNER TYPES

PAPER PUSHER

- Transactional mentality
- Burned out, lack energy / motivation to facilitate change
- Living under red tape, little to no creativity
- Conflict avoidant with bureaucrats and public
- Count down days from desk, staring at GIS Maps & going through the motions

OUTCOMES?....normally we just measure the height of the files!
ATTORNEY TYPES

STRINGENT STEWARD OF LAW

- “This is the way it’s always been done” mentality
- Focused on limiting client risk, conservative approach
- Thinking about defensibility, the nightmare scenario
- Avoid policy recs, resistant to untested / new approaches
- Agent of red tape, racking up those billable hours
BOARD MEMBER TYPES

JOE/JANE CITIZEN

- Volunteer or part time, no ability / incentive to be fully engaged
- Lack basic qualifications, no exam required
- Lack planning knowledge, exposure to best / alternative practice
- Rely heavily on attorney / staff for decision-making
- Swayed by resident relationships

“IT’S DIFFICULT FOR SOME OF THE OTHER BOARD MEMBERS TO BE FULLY ENGAGED WHEN THE WEATHER IS SO NICE AT THEIR END OF THE TABLE.”
APPLICANT TYPES

PROPERTY OWNERS & DEVELOPERS

• Jon & Jane Handyman Homeowner
• Jack & Jill Property Rights Crusaders
• Inexperienced Developer
• Experienced Developer
• Attorney/Engineer for a Client
• Developer crying cost burden
DOCTRINES BY DISCIPLINE

PLANNING

1. Do Good, not Harm
2. Long-Term, Visionary Approach
3. Community Driven Plans
4. Education with Legislation
5. Balancing Processes & Outcomes
6. Smart Growth Principles

LAW

1. Procedural Due Process
2. Equal Protection
3. Authority
4. Taking of Property
5. Vested Rights
6. State Preemption
7. First Amendment Rights
• As a profession, planners work to serve a greater good than the interest of one or another stakeholder and uphold the rights of minorities as well as of majorities

• Historically, planning has been a force for good and bad, we recognize this history and strive to be a force for good as we move forward
DOCTRINES

PLANNING

Long-term, Visionary Approach

- Plan for the future, not the past
- Be proactive / flexible in responding to changing technologies & trends
“make no little plans; they have no magic to stir [people’s] blood...
aim high in hope and work...”

"STIRRED BY BURNHAM, DEMOCRACY CHAMPION"
CHICAGO RECORD-HERALD, OCT 15, 1910
DOCTRINES

PLANNING

Community Driven Plans

• Engage the community early & often
• Rely on expertise of residents to identify issues & opportunities
• Plan with them & not for them
• Establish trust & collaborative mindset
DOCTRINES

PLANNING

Education with Legislation

- Context, understanding, progressive tools, etc.
- Demonstrate connection between policy & tools
- Structure tools based on capacity for implementation
- Be responsive to local goals, concerns, and needs
- Garner public / municipal support for policy
DOCTRINES

PLANNING

Balance of Processes & Outcomes

- Ensure public discussion is transparent, constructive, respectful of differences
- Address where input is reflected in outcome, or why not
- Outcomes only as important as their ability to:
  - Provide meaning to the environment
  - Support human activities
  - Provide access to resources & distribute them equitably
DOCTRINES

PLANNING

Smart Growth Principles

- Regional & local Focus
- Compact Development
- Mixing of uses
- Mobility Choices, Complete streets
- Preservation & Protection of Ecosystem Services
- Infill Development over Greenfield Development
DOCTRINES

LAW

Procedural Due Process

• Requires that the administrative process by which regulations are adopted and enforced must follow the prescriptions of state statutes and meet fairness requirements.
DOCTRINES

LAW

Equal Protection

• Localities must avoid improperly discriminating among similar parcels or against types of land users in violation of equal protection guarantees of the state or federal constitution.
DOCTRINES

LAW

Authority

- since local governments in New York can exercise only those powers delegated to them by the state legislature, land use regulations cannot be beyond the local authority.
DOCTRINES

LAW

Taking of Property

• Local land use regulations must not effect a taking of private property for a public purpose without just compensation in violation of the "takings" provisions of the state and federal constitutions.
DOCTRINES

LAW

Vested Rights

• Limits the authority of municipalities in certain cases to impose significant new regulations on existing investments in land, such as completed structures or projects under construction.
Local land use regulations are not permitted to control matters whose regulation has been preempted by the state legislature.
• Local regulations must not abridge freedoms of speech, expression and the exercise of religion protected by the state and federal constitutions.
THE COMMON GROUND
(IN BAD PRACTICE)

APPROACH
- Minimum requirements met
- Minimal public outreach
- Transactional; going through the motions
- Reactionary; short-term
- Pre-determined ends
- Inflexible; one size fits all

OUTCOME
- Puts you on defense
- Lacks sound rationale
- Creates room for misinformation
- Invites public outrage
- Limits potential for highest, best use
- Does not advance vision
THE COMMON GROUND  
(IN GOOD PRACTICE)

APPROACH

• Legal due diligence
• Meaningful public engagement
• Visionary principles
• Alternative end evaluation
• Context sensitive; works for one may not work for all

OUTCOME

• Provides ample evidence of well-considered process
• Creates potential for public support / consensus
• Responds to unique factors
• Increases potential for highest, best solution
• Furthers long-term vision
NEXUS OF PLANNING & LAND USE LAW

What is Required & What is Just Good Practice

GENESEE BREW HOUSE – 25 CATARACT STREET
PLANNING / ZONING CATCH 22

PRE-REGULATION
Organic Settlement
Localized communities
Low impact uses
Pride in character

EUCLIDEAN ERA & SUBURBAN SPRAWL
Inorganic Development
Isolated communities
separation of uses
Destruction of character

URBAN RESURRECTION
Smart Growth Trends
Contextual Communities
Design over use
Definition of character
All [municipal] land use regulations must be in accordance with a comprehensive plan adopted pursuant to this section.

NYS TOWN LAW § 272-a (11) a
NYS VILLAGE LAW § 7-722 A (11) a
NYS GENERAL CITY LAW § 28-a.11 (a)
In the absence of a well considered comprehensive plan, the risk always exists that the zoning upon which it is supposedly based will be invalidated if challenged in court.

NYS DEPARTMENT OF STATE
(ACCORDING TO J. STEINMETZ)
"...a comprehensive plan is the essence of zoning... without it, there can be no rational allocation of land use."

UDELL V. HAAS 21 N.Y. 2D 463
(N.Y. 1968)
UDELL V. HAAS (1968)

Lake Success (v)

- 1938 – Zoning Map & Ordinance Established
- 1958 – Amend Zoning Ordinance & title it “Development Policy”
- 1960 – Rezone two parcels from Business to Residential in response to sketch plan proposal
UDELL V. HAAS (1968)

- Rezoning considered Unconstitutional & Discriminatory
  - "ultra vires" – Beyond authority of Village
  - Not in accordance with "comp plan," whatever that may be
  - Zoning as self-contained activity, rather than means to a broader end, may tyrannize property owners

- Errs of Village
  - Utilized Zoning Code as "Development Plan"
  - Maintained business zoning of parcels over time; resulting in statement that nonresidential uses were considered appropriate
  - Reacted to single development proposal
UDELL V. HAAS (1968)

- CP protects certainty to landowners from arbitrary restrictions by pressures of outraged citizens
- CP insures public welfare is served & zoning isn’t a Gallup Poll
- CP provides for calm, deliberate consideration of alternatives

BE PROACTIVE WITH LAND USE PLANNING
NYS TOWN LAW § 272-a (2)

(A) TOWN COMPREHENSIVE PLAN

means the materials, written and/or graphic, including but not limited to maps, charts, studies, resolutions, reports and other descriptive material that identify the goals, objectives, principles, guidelines, policies, standards, devices and instruments for the immediate and long-range protection, enhancement, growth and development of the town located outside the limits of any incorporated village or city.

(B) LAND USE REGULATION

means an ordinance or local law enacted by the town for the regulation of any aspect of land use and community resource protection and includes any zoning, subdivision, special use permit or site plan regulation or any other regulation which prescribes the appropriate use of property or the scale, location and intensity of development.
The end is essential but the means must nevertheless conform to constitutional standards.
FRED F. FRENCH INVESTING CO. V. CITY OF NY (1976)

PROPERTY DETAIL
- Large Residential Complex
- Two parcels sold, currently private park space
- New owner proposes max residential development
- Public Outcry

CITY ACTION
- Rezones to “special Park District”
- Transfers air rights, severed from surface rights
- Requires owner to have plan for maintenance
FRENCH INVESTING V. CITY OF NY (1976)

MUST PROVIDE FOR DUE PROCESS

- Substantial relation to legitimate gov’tl purpose
- Reasonable relation between end sought & means used
- New ideas & standards must evolve... task is difficult but not beyond management
ZONING IS A RIGID TOOL

“Indeed it has been said that zoning is the worst form of planning except for all those other forms that have been tried from time to time...”
LIMITATIONS OF REGULATION

• Land Use Law by nature requires certainty and rigidity
• Generally, celebrated communities developed organically without certainty, rigidity, or restriction
• Zoning created “bad practice,” is reactionary to presumed development impact
• Flexibility required to facilitate “good practice”
ELEMENTS OF APPROACH

REGULATION

• Overly prescriptive, inflexible
• Tries to answer all conceivable situations; nightmare scenario
• Unable to predict or respond to future conditions
• Centered around yes/no answers
• Limited room for discretion
• High level of certainty

GUIDANCE

• Relative, flexible requirements
• Tries to respond to context
• Identifies conditions of concern applicable to future
• Centered around general decision criteria
• High room for discretion (may be arbitrary)
• Low level of certainty
BALANCE OF REGULATION & GUIDANCE

- Establish connection to development vision / policy
- Use rigidity to establish acceptable parameters
- Apply standards to conditions of concern (noise, traffic, intensity of use, etc.)
- Implement clear decision criteria that reduces potential for arbitrary restrictions & provide base level of certainty to applicants & public
- Be proactive in reviewing & revising policy & regulation
TOWN OF NIAGARA

1972 Land Use Plan
2003 Zoning Map

BAD PRACTICE
BAD OUTCOME
VILLAGE OF PITTSFORD

2004 Land Use Plan
Current Zoning Map
VILLAGE OF PITTSFORD

2019 Joint Comprehensive Plan & Zoning Code Update

GOOD PRACTICE	GOOD OUTCOME?
EXISTING:
13,500 sf lot area
30ft front yard

PROPOSED:
10,000 sf lot area
20ft front yard
EXISTING:
13,500 sf lot area
30ft front yard

PROPOSED:
10,000 sf lot area
20ft front yard

Or the most common [lot area / front yard] on the block (within +/- 2 feet) in which it is located as determined by property survey data on file with Ontario County.
CLIFTON SPRINGS

Attorney Response

The meaning of "most common" is vague and not definitive. Does this mean the "average" of all of the lot sizes, lot widths or setbacks?

With most Zoning Laws, the municipality is desirous of having all new development be in conformity with the new regulations and for non-conforming lots to, over time, be phased out and themselves be brought into conformance with the new Zoning Law.

With the Notes permitting measurements less than the objective numbers in this Chart, the Village is providing a mechanism for non-conforming lots or structures to increase in number within the Village...
With the Notes permitting measurements less than the objective numbers in this Chart, the Village is providing a mechanism for non-conforming lots or structures to increase in number within the Village...

(although they would technically be permitted by these Notes).
CLIFTON SPRINGS
ADVOCATING FOR GOOD PRACTICE

- Identify where rigidity creates negative outcome
- Determine lowest level of regulation to achieve desired outcome
- Resist urge to respond to every imaginable scenario
- Provide for definition & measurement in context
- Utilize administration & enforcement resources
- Ensure relief mechanism is in place
TOWN OF HAMBURG
FAILURES OF BAD PRACTICE

Existing Conditions
TOWN OF HAMBURG

FAILURES OF BAD PRACTICE

2007 Comprehensive Plan

- Residential (High Density/Mixed)
- Business (Regional/Local)
TOWN OF HAMBURG

FAILURES OF BAD PRACTICE

Zoning Code

• M2 District
• M3 District
THANK YOU!

Please feel free to reach out to us with any questions!