

# Real Estate Journal

COVERING ALL OF HUDSON VALLEY LONG ISLAND, NEW YORK CITY, MANHATTAN AND UPSTATE NEW YORK

## Cluster zoning: A valuable tool in a changing market

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The end of Long Island's post-war land rush is in sight. Long Island regional planners estimate that "total build-out" is only 16 years away. To make matters worse, desirable tracts available for residential development are increasingly being targeted by heavily funded public "open space" acquisition programs.

As a consequence, developers are re-visiting parcels that, in the past, were deemed too difficult or expensive to develop because of steep slopes, wetlands, an odd configuration, troublesome easements or other problematic features. Informed developers who understand the cluster development provisions of Section 278 of the Town Law will have a significant advantage in locating overlooked properties that can be developed at higher densities and, in some cases, less expensively than previously thought.<sup>1</sup>

In simple terms, Section 278 authorizes subdivisions containing lots which do not adhere to the dimensional requirements specified in the municipality's zoning ordinance. More precisely, the statute provides "an alternative permitted method for the layout, configuration and design of lots, buildings and structures, roads, utility lines and other infrastructure, parks, and landscaping in order to preserve the natural and scenic qualities of open lands."<sup>2</sup>

Under the authority of this expansive language, municipalities may, in their discretion, "permit deviation from applicable minimum area, side and rear yard, depth and frontage requirements."<sup>3</sup> In addition to the

statute's express purpose to "enable and encourage flexibility of design and development of land in such a manner as to preserve the natural and scenic qualities of open land," the New York Court of Appeals has recognized that cluster subdivisions authorized by Section 278 provide an "optional planning technique permitting Planning Boards to exercise greater flexibility in subdivision approval for the purpose of achieving more efficient use of land containing unusual features..., for facilitating economical provision for streets and utilities, as well as for preserving the natural and scenic qualities of open lands."<sup>4</sup> Similarly, "economy, flexibility and scenic beauty are all appropriate reasons for permitting cluster zoning."<sup>5</sup>

The principal benefit of Section 278's flexibility is allowing maximum as-of-right density even though the property may be burdened with wetlands, ponds, steep slopes, conservation areas or other features that, in the absence of Section 278, would render large areas of the property unbuildable under the provisions of the municipality's zoning code.

Although the property can never yield more than the density permitted under the zoning code, it need not yield less under Section 278.

The threshold decision to employ a cluster development, in lieu of a traditional subdivision, as well as the determination of the maximum yield allowed on the property, is made by the planning board in the exercise of its judgment.

That yield cannot "exceed the number which could be permitted, in the planning board's judgment, if the land were subdivided into lots conforming to the minimum lot size and density requirements of the zoning ordinance..."<sup>6</sup>

On the all-important issue of Section 278 yield calculations — an area of frequent dispute between developers and the municipalities — it is critical to remember that yield is determined only with reference to the town's zoning code, without regard to

restrictive easements or the limiting regulations, procedures and prospective decisions of other agencies such as county health departments and the NYSDEC.

Thus, portions of a property subject to a no-build conservation easement will be included when calculating yield under Section 278.<sup>7</sup> Similarly, the presence of wetlands on the property will not affect Section 278 yield calculations.<sup>8</sup>

Also, areas for landscaped buffers and fire lanes required under fire commissioner regulations, as well as other features not mandated in the municipality's zoning code, may be included for purposes of determining yield under Section 278.<sup>9</sup>

The potential benefits of Section 278 can be critical when evaluating the development potential of a parcel previously overlooked.

For example, prohibitive site costs and the loss of buildable lots associated with properties burdened with difficult topography may be avoided by a cluster development, thus transforming an unfeasible project into a profitable one.

Similarly, properties with insufficient street frontage or insufficient access under the applicable zoning ordinance can, under Section 278, be successfully developed using flag lots and other dimensional modifications. Inconveniently located wetlands and ponds, which often cramp lot layouts in conventional subdivisions, can be avoided under Section 278 without losing yield.

Moreover, lost opportunities associated with large lots containing historic structures can be avoided by employing Section 278 in a manner that will not only insure an as-of-right yield, but also a natural setting for the historic site as part of a layout unencumbered by static dimensional requirements.

Finally, it is important to remember that although Section 278 is often associated with townhouse projects clustered around common areas owned by a homeowners' associa-

tion, its provisions are equally applicable to creating subdivisions providing modified single family fee simple lots without common areas.

Clearly, the potential options available under Section 278 are extremely important when searching for opportunities in an increasingly competitive and shrinking residential builders market. Success will often depend on the ability to envision the potential of properties passed over in easier times. Understanding Section 278 can provide an important edge.

### (Footnotes)

<sup>1</sup> See also, Village Law §7-738 (analogous cluster development statute).

<sup>2</sup> Town Law § 278 (1)(a).

<sup>3</sup> *Bayswater Realty & Capital Corp. v. Planning Bd. of Town of Lewisboro*, 76 N.Y.2d 460, 467, 560 N.Y.S.2d 623, 626 (1990).

<sup>4</sup> *Id.*

<sup>5</sup> *Kamhi v. Planning Bd. of Town of Yorktown*, 59 N.Y.2d 385, 390, 465 N.Y.S.2d 865, 867 (1983)

<sup>6</sup> Town Law § 278(3)(b)

<sup>7</sup> *Friends of the Shawangunks, Inc. v. Knowlton*, 64 N.Y.2d 387, 487 N.Y.S.2d 543 (1985) (portion of property subject to conservation easement can be included in lot yield analysis under Town Law § 278 because easement restrictions were not part of municipality's zoning code).

<sup>8</sup> *Forte v. Zoning Bd. of Appeals of Village of Warwick*, 150 A.D.2d 339, 540 N.Y.S.2d 865 (2d Dep't. 1989) (authorizing the inclusion of wetlands in yield studies completed under Section 278 because "land may be used in determining appropriate density, even if the open land itself cannot be built upon.")

<sup>9</sup> *Penfield Panorama Community, Inc. v. Town of Penfield Planning Bd.*, 253 A.D.2d 342, 688 N.Y.S.2d 848 (4th Dep't 1999).

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