

# Suffolk County Planning Commission

## Advisory News

Volume 1  
Issue 1  
Spring - 1997

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## ADVISORY DEED COVENANTS

RECENTLY, the Suffolk County Planning Commission adopted new guidelines for **advisory deed covenants**. These new guidelines cover proposed subdivisions planned on farmland, abutting farmland or near farmland.

The explosive second home or retirement home market or, in some cases, the continued wave of suburban development running up against farmland has not only fueled the loss of farmland, but creates new neighbors for farmers. This brings farming practices under closer scrutiny, and fosters conflicts between a perceived "rural" lifestyle and a noisy, dusty, active industry. Heightened awareness of environmental hazards caused by an over abundance of synthetic chemicals and abundant attendant publicity have placed great pressures on the farming community.

The layout of new subdivisions near farms coupled with advisory covenants for new homeowners can go a long way to lessen conflicts. Farmers are also learning to work with their new neighbors in the timing and extent of their irrigation, pest and weed control, harvesting and composting operations. Grouping new lots in a compact form rather than spreading them out along farm fields minimizes the "conflict frontage". Notifying new landowners that their property is near an active farm which could include noise, dust, spraying, odors gives them a more realistic message about farming. Because of the importance

of farming to the economy of Suffolk County and its links to business and tourism, it would be a shame if, by lack of foresight, an important segment of the county's economy is overwhelmed by an ex-urban home market. Further, the loss of farming would damage the very roots of Suffolk County's history and community fabric.

In addition to the farmland advisory covenant, the Planning Commission has, for sometime, recommended advisory deed covenants on planned subdivisions located near airports or waste disposal sites. While some speculation might exist that advisory covenants would have a negative impact on marketing of properties, such has not proven to be the case either nationally or locally. Usually, site decisions are made after due diligence by buyers and their consultants, and the advisory covenant serves to confirm what is already known or it is not the one thing that dissuades a buyer. Generally, the more site information is available to people the better, for them, their communities and for the adjacent land uses which might be creating the impacts.

When recommending advisory covenants adjacent to airports, the Commission uses the FAA noise contour maps filed for each airport, coupled with the runway approach paths to determine the areas off-airport with the greatest impacts. When examining abandoned waste dumps, municipal solid waste disposal facilities or other potentially hazardous sites, the Commission relies on information from the Suffolk County Health Department and others. This may include the nature of the material buried, its age, its extent and any testing, monitoring, or remediation reports available.

The use of advisory covenants or statements noted on filed maps can be one more method for government to protect the health, safety and welfare of its citizens and provide additional forethought for buyers involved in real estate transactions.

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## SITING WIRELESS TELECOMMUNICATION FACILITIES

**E**SCALATING advances in telecommunications have created increasing pressure on municipalities to site telecommunication facilities. But because communications involve national interests, federal law limits the amount of control communities have over siting these facilities.

The Communications Act of 1934 was created to regulate communication by wire and radio so that all the people of the United States have efficient, world-wide wire and radio communication service at reasonable charges. The Federal communications Commission was created by the 1934 Act. The Telecommunications Act of 1996, signed into law in February 1996, completely updated the Communications Act of 1934. (The official citation for the new Act is: Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).)

The goal of this new law is to let anyone enter any communications business - to let any communications business compete in any market against any other. The Telecommunications Act of 1996 has the potential to change the way we work, live and learn. It will effect local and long distance telephone service, cable programming and other video services, broadcast services and services provided to schools.

### PRESERVATION OF LOCAL ZONING AUTHORITY

The Telecommunications Act of 1996 states that nothing in this Act shall affect the authority of a State or local government over decisions regarding the placement, construction, and modification of personal wireless service facilities except for the following:

- The regulation of personal wireless service facilities by any State or local government
  - 1) shall not unreasonably discriminate among providers of functionally equivalent services; and,
  - 2) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
- A State or local government shall act on any request regarding personal wireless service facilities within a reasonable period of time after the request is filed.
- Any decision by a State or local government to deny a request regarding wireless service facilities shall be in writing and supported by sub-

- stantial evidence contained in a written record.
- No State or local government may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.
- Any person adversely affected by any final action or failure to act by a State or local government that is inconsistent with this law may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government based upon the environmental effect of radio frequency emissions may petition the Commission for relief.

## SITING STRATEGIES FOR WIRELESS COMMUNICATION FACILITIES (WCF)

### ▶ **Moratorium**

The initial issue that has seems to arise most often is whether it is necessary or appropriate to enact a moratorium on WCF's until certain information can be gathered. Three things to remember with a moratorium: 1) The purpose must be clear, 2) during the moratorium some demonstrable progress must be made and 3) the moratorium must be timely and not unfairly effect individual service providers.

### ▶ **Variance**

Potential wireless facilities that are not allowed uses in the district in which they are proposed could be required to seek a variance. The variance case must, however, take into account whether denial of the application will result in a denial of wireless service to a community or a portion thereof. If a denial pursuant to traditional variance analysis would act to create a "gap" in service, the 1996 act may serve to preempt that analysis and require that the variance be issued.

### ▶ **Special Permit or Conditional Use**

Establishing specific requirements for WCF's through either the special permit or conditional use process, may allow facilities development in harmony with local planning goals.

### ▶ **Overlay Districts**

Planning for WCF development can also be accomplished by using overlay districts and altering the requirements for WCF, including towers, based on the underlying district requirements.

### ▶ **Floating zones**

Floating zones may also be used to help tower development remain consistent with a community's plan for development. Floating districts provide requirements for establishment of a particular use but are not tied to any particular geographic location. When a development proposal for a specific site meets the qualifications set out in the definition, the zone attaches to that site for purposes of that development. This technique could be applied to tower siting as well, with the elements of appropriate sites being defined but not attached to a particular site.

### ▶ **Co-location of wireless facilities**

There are numerous difficulties with the co-location of wireless facilities. Requiring competitors to share towers may inhibit competition, in that each providers' geographic coverage would be similar and would thus

decrease the potential for competition between them. Additionally, technology may preclude co-location because towers must be of appropriate construction for the varying uses potentially required of them. Finally, requiring an owner to share a tower may be difficult unless the tower is owned by a municipality. A municipal co-location requirement may be a prohibition on service, and thus be preempted by the Telecommunications Act.

Creating co-location incentives rather than mandates may encourage co-location. Incentives include: expedited approval process for siting facilities on existent towers; expedited approval process for siting towers that have additional capacity; and, assurances from tower owners to negotiate tower leases in good faith.

Building tower facilities that are large enough and designed to hold many different telecommunications facilities, including those belonging to the municipality, may allow for a reduction in the number of towers in a given area. One note of caution: it is possible that a restriction prohibiting all non-municipally owned facilities would be violative of the 1996 act, where municipally owned facilities are inadequate to allow for the full provision of service in a given area. Encouragement to use municipally owned facilities, as opposed to a mandate to do so is probably the safer path.

### ▶ **Control of Visual Impact**

There are a number of strategies to control the visual impact of WCF's. Affectionately known as "stealth" technologies some antennas and towers can be designed to be camouflaged, or incorporated into building and site designs. Bell towers, water towers, church steeples, utility poles, street lamps, trees and other methods have been employed to conceal antenna and towers. As with co-location and municipal facilities, encouragement toward camouflage techniques rather than a requirement is most likely best.

Questions about this topic, and about federal regulation of wireless telecommunications services in general, may be addressed to Karen Brinkmann, Associate Chief of the Wireless Telecommunications Bureau, 202-418-0783 or see the American Planning Association booklet *Implementing the New Telecommunications Law* (co-published by NACo, and APWA) or check the Federal Communications Commission Wireless Service Bureau web site at [www.fcc.gov](http://www.fcc.gov).

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## MORATORIUM ON DEVELOPMENT

**A moratorium on development** is a local law or ordinance that **suspends the right of property owners to obtain development approvals** while the community takes time to consider, draft and adopt land use plans or rules to respond to new or changing circumstances not adequately dealt with by its current laws.

Development moratoria may be general or specific. A **general moratorium** imposes a ban on all development in the community. Hardship exemptions may be provided and certain actions may be exempted.

A **specific moratorium** may prevent development approvals in a particular geographic area or of a certain type. Moratoria have suspended the right to process proposals relating to a specific land use. For example, they have been enacted to affect only the construction of docks, for instance, or communications antennas.

### PURPOSE

A **moratorium on development preserves the status quo for a reasonable time** while the municipality develops and adopts a land use strategy to respond to new or recently perceived problems. The moratorium prevents developers and property owners from rushing to develop their land under current land use rules that the community is in the process of changing. By so doing, it helps to accomplish the purpose of the new rules by giving them the broadest possible applicability and preventing development that is inconsistent with them.

### AUTHORITY

There is no specific statutory authorization to adopt a moratorium on development. The courts have pointed to two separate sources of authority, while consistently confirming the municipal power to enact moratoria.

Communities are implicitly authorized to take those actions they deem reasonable to encourage the most appropriate use of the land throughout the municipality. In light of new or changing circumstances, a moratorium may be necessary to allow the community to achieve this express purpose of zoning and land use planning.

Some courts have held that a **development moratorium is a form of zoning**, implying that it is part of the statutorily delegated power to adopt and amend zoning provisions. Alternatively, a community's authority to adopt a moratorium has been referred to as a "police power" measure appropriate to prevent conditions that threaten the community's health, safety, welfare and morals.

### IMPLEMENTATION

A **moratorium is, from one perspective, the most extreme land use action that a municipality can take because it suspends completely the rights of owners to use their property**. Seen in this light, it is advisable to precede the adoption of a moratorium by **findings** that confirm the necessity of this action. What are the **conditions** that mandate the imposition of a moratorium? Are no other **alternatives**, less burdensome on property rights, available? Why are the existing land use plans and ordinances not adequate? What **recent circumstances** have occurred that justify the adoption of the moratorium? How serious and **urgent** are these circumstances? What **hard evidence** is there to document the necessity of the moratorium?

When adopting a moratorium, the municipality may set forth how the situation that gave rise to the moratorium is to be dealt with. What local bodies are responsible? What studies are to be done? What resources are being made available to complete those studies? Can deadlines be established for various steps in the process? **The more specific and legitimate this plan and timetable are, the more likely the moratorium will be found to be reasonable.**

Based on this action plan and timetable, a date can be selected for the expiration of the moratorium. A moratorium can be extended if the timetable cannot be met; however, the reasonableness of the action is enhanced by setting a date for expiration that is legitimate under the circumstances.

A moratorium should be adopted in conformance with all procedures required of any zoning or land use action, including notice, hearing, the formalities of adoption and filing. While a moratorium does not require an environmental review under the State Environmental Quality Review Act, if it affects adjacent municipalities or county facilities, it may be subject to review by those governments before it can be formally adopted. **The Suffolk County Planning Commission considers suspension of any portion of a Zoning Code to be a "municipal zoning action" requiring review by the Commission.**

## LIMITATIONS AND CONCERNS

**Since development moratoria affect property rights so severely, they must be reasonable or run the risk of being challenged, voided by the courts and, perhaps, resulting in a damage award against the locality.** Reasonableness is best established if the community can document that it is facing a true emergency. Several court decisions sustaining moratoria refer to the "dire necessity" that justifies them. Such a necessity arises not only when health and safety risks are confronted, but also when the community is facing a significant new land use problem that its existing regulations were not designed to handle.

For the same reason, when specific action plans and timetables are established to deal with the necessity or emergency, the reasonableness of the locality's moratorium

is demonstrated. Similarly, a community needs to make reasonable progress in carrying out the plan and adhering to the schedule so its actions are seen to be reasonable. Moratoria that have been extended for up to three years have been sustained by a showing that the community was diligently pursuing its plan and timetable and shorter moratoria have been voided because the community was making little or no progress. In the same way, the plan must be calculated to deal directly with the necessity or emergency at hand; otherwise, its reasonableness may be questioned.

Moratoria do not apply to approved projects where the developer has completed construction or has completed substantial construction in reliance on a development approval or permit. Such developers are said to have vested rights in their permits and to be immune from changes in applicable regulations. Other property owners, who have made less progress, are said to have no legitimate or enforceable expectation that the rules applicable to the development of their land might not change in the interest of protecting the public health, safety or welfare.

## CITATIONS:

1. In *Duke v. Town of Huntington*, 153 Misc. 2d 521, 581 N.Y.S.2d 978 (Sup.Ct.,Suffolk Co., 1991), the property owner challenged a moratorium prohibiting construction of any docks. The court held the moratorium unreasonable under the circumstances.
2. In *B & L Development Corp. v. Town of Greenfield*, 146 Misc. 2d 638, 551 N.Y.S.2d 734 (1990), the court struck down a one year moratorium on all building permits and land use approvals including subdivision and site plans. **The court found that in adopting the moratorium, the Town had failed to notify the county government** under General Municipal Law § 239-m and adjacent communities under Town Law § 264 and to follow its own requirements for adopting zoning provisions.
3. In *Cellular Telephone Co. v. Tarrytown*, 209 A.D.2d 57, 624 N.Y.S.2d 170, (2nd Dep't, 1995) the court struck down a moratorium prohibiting the construction of cellular antenna.

## SOURCE:

**Local Leader's Guide to Land Use Practice, Second Edition (In Progress)**, Series III: Innovative Tools and Techniques, Issue 1: Moratorium on Development, <http://www.law.pace.edu/landuse/morato~1.html>, downloaded 4/23/98.