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PLANNING NEWS

600 BROADWAY, ALBANY, NY 12207 | WINTER 2016

Conference 2016 • April 17th – 19th

Gideon Putnam – Saratoga Springs

As we head into 2016, NYPF staff is hard at work planning the program for next April's annual conference (April 17-19). Though we haven't yet ironed out all the details, here is a look at some of the sessions we will be offering on Monday and Tuesday at our host hotel, the historic Gideon Putnam in Saratoga Springs.

As in years past, the upcoming 78th Annual NYPF Planning & Zoning Conference offers a mix of exciting and educational sessions for both new and seasoned board members, as well as for Code Enforcement Officers, municipal attorneys and professional planners.

- Zoning for Micro-Alcohol Production
- Designing Urban Streetscapes and Alleys
- Preparing Checklists for Successful Meetings
- Zoning for Solar Energy
- Parking Issues: Real and Perceived
- Site Plan Review
- Introduction to the Duties of the ZBA
- Conducting Zoning Audits as Part of Municipal Land Use Code Updates
- Dealing with Troubled Properties
- Planning for Multi-Generational Communities
- SEQRA Findings & Limitations
- Issues Surrounding Short-Term Rentals (Airbnb)
- Signs
- Rare Use Variances
- Case Law Updates
- Ethics
- Sign Laws
- FOIL & the Open Meetings Law

See Registration on page 13

The final list of sessions, as well as a schedule of when they will be presented, will be on our website by mid-January. We will also be providing more detailed session descriptions.

NEWSLETTER HIGHLIGHTS

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NEW YORK PLANNING FEDERATION
is a non-profit membership organization established in 1937. Our mission is to promote sound planning and zoning practice throughout New York State. Membership, which currently includes nearly 10,000 individuals, is open and welcome to anyone supporting this mission. Membership categories include municipalities, counties, public organizations, private businesses, individuals and libraries.

PLANNING NEWS
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From the Executive Director

Judith Breselor, AICP

You should be receiving this edition of our Winter 2016 newsletter just as you are winding down from the holiday season. Although for many, the busy season is over, the NYPF staff is working very hard on our upcoming annual conference, which will be at The Gideon Putnam Hotel in Saratoga Springs, April 17-19th. So sit back, take your time reading this newsletter, and plan on attending our 2016 conference. Sessions will provide the mandated credit for planning and zoning board members, as well as CM credits for our professional planners, CEO credits for Code Enforcement Officers, and CLE credit for attorneys. Conference topics will include a discussion of short-term rentals, zoning for micro-alcohol production, zoning for solar, SEQRA visual assessments, and a host of other timely issues.

I want to officially say good-by to all of you. Over the summer I decided it was time to enjoy some of life's leisure activities that so many of my friends have been talking about, so within the next few months I will have some free time to spend with family and friends. It has been a great pleasure to serve as the Executive Director of NYPF and I will certainly always be a big supporter of this great, educational organization.

Many of our planning and zoning boards have contacted me over the past year and asked how to review applications for Solar Energy. Many questions pertain to various system types and how they should be reviewed using local codes. We took these questions to Jessica Bacher from the Land Use Law Center at Pace Law School and Jessica developed an interesting and timely article for this month's newsletter.

Micro-alcoholic production has been thriving in New York State. NYPF intern TJ Kennedy has written an article that helps us understand the land use process and the link that often occurs between agriculture and production. I am sure you will find his article extremely interesting and hope it will help you understand the dynamics of what is happening on this front throughout New York State.

Moratoria can and should be used as a land use tool when necessary. However, many municipalities are not sure why or how to use moratoria, nor their legal requirements. Robert Feller, Esq. provided an article to help you understand the regulatory powers of this land use tool; I know that you will find it very useful for discussions with your community.

Please read all of the great information about our upcoming conference. I will be there to say hello to new friends and good-by to my many friends that I have met as Executive Director.

Judy Breselor, AICP
Executive Director
New York Planning Federation

Zoning for Solar Energy

By Jessica Ann Bacher

Despite their invention in the 20th century and countless technological advances since, many municipalities have not amended their zoning ordinances to allow and accommodate solar energy systems. Solar energy has expanded from simple roof-mounted panels on single-family homes in the 1970s, to include materials integrated into small- and larger-scale, ground-mounted structures and large-scale solar arrays or farms, as well as medium-scale roof-mounted systems on large office and commercial buildings.

Currently, local land use authorities may discourage solar energy projects because they are not clearly permitted under local zoning. As solar energy technology progresses and the economy requires cleaner, often cheaper, renewable fuels, it is imperative that local governments advance their economic development and sustainability plans by reviewing and amending local laws to permit the types of solar energy systems communities desire for their homeowners and businesses.

The Role of Local Governments in Planning & Zoning for Solar Energy

Although both the federal and state levels of government have strong interests in encouraging renewable energy systems, the power to permit them under land use law has been delegated by most states to local villages, towns and cities. This is the case in New York where, with few exceptions, state objectives involving land use are accomplished only in cooperation with local governments.

There are approximately 1,600 local governments in our state, all of which enjoy the discretion and power to adopt comprehensive land use plans, zoning and land use laws, and to establish a variety of local land use boards to administer these controls–including planning boards, ZBAs and special boards for historic preservation, environmental conservation and architectural review. Under New York law, land use regulations must conform to local comprehensive plans; local boards cannot act if they are not empowered to permit certain land uses, subject to legislated standards. Therefore, local officials who want to encourage solar energy systems should adjust their local land use laws by adding a solar energy component to the comprehensive plan, or adopting a special solar energy policy or plan to guide the reform of land use regulations.

When a homeowner, businessperson or developer proposes a solar energy system installation on an existing building or its surrounding lot, the local Zoning Enforcement Officer (ZEO) must first determine whether the municipality's zoning allows the system, the type of land use under which the system falls, and the requirements it must meet. Because the ZEO must disapprove all land uses not permitted in zoning, it is important for the local legislature to determine which solar energy systems it wants to permit, define those systems, add them to the zoning ordinance, ensure that each defined system is permitted in the local zoning, and make sure a local board is designated to approve that use.

Defining Solar Energy Systems in the Zoning Code

In order to properly permit and regulate solar energy systems, the local zoning code must include definitions delineating each type of system the community wishes to permit. Because solar energy systems vary greatly in size and shape, they require varying levels of review, depending on magnitude of impacts. After drafting clear definitions, the municipality must determine where to permit and how to regulate each defined system in the local code, as each must be subject to clear standards and have an appropriate required approval process or exemption.

Once a municipality has determined the various solar systems it wants to allow, they should be categorized into several different definitions using the factors of type, location of usage, size and shape of the system, and system energy capacity according to their impacts on land and neighboring properties. The number of factors used to create definitions varies among municipalities; sometimes definitions are very simple, using a single factor to differentiate between systems, such as distinguishing between types. (For example, a community might permit

roof-mounted systems but prohibit ground-mounted ones in some residential districts.)

System Types

Most municipalities distinguish between three types of solar energy systems: (1) roof- or building-mounted; (2) ground-mounted or freestanding; and (3) building-integrated. Roof- or building-mounted solar energy systems are attached to the top of a building or structure. Generally, a ***roof-mounted*** system is secured using racking systems that minimize impacts. It is mounted either level with the roof, or tilted toward the sun. ***Ground-mounted or freestanding*** solar energy systems are installed directly in the ground and not attached to any existing structure. Single or multiple panels can be mounted on individual or multiple poles when space, structural, shade or other constraints inhibit the use of roof-mounted systems. Much larger freestanding systems, including solar farms, can be built on the ground. Finally, ***building-integrated*** solar energy systems are incorporated into a building or structure as a structural component, such as a roofing system or façade. This can include roof shingles or tiles, laminates, glass, awnings, etc. (As a rule, zoning does not include definitions for building materials because the building code is responsible for their regulation. However, a municipality may include definitions for building-integrated solar energy systems in order to clarify differences in approval process requirements for the different system types.)

Municipalities should take care when defining solar energy systems based on type, as ground-mounted ones are often associated with large impacts, and the size of both roof- and ground-mounted systems influences their effect on surrounding properties.

Updating Local Codes

After creating solar energy system definitions, a municipality must determine in which zoning districts to permit each defined system, as well as how to permit each system. They must also provide appropriate amendments for bulk and area requirements to accommodate the systems. In most codes this means that the local government must modify the Article creating zoning districts by adding defined solar energy systems to the list of permitted uses in each district, and by amending dimensional requirements in the bulk and area schedule for each permitted system.

Generally, municipalities allow various types of systems in residential, agricultural, commercial, industrial and mixed-use districts based on their impacts on surrounding properties. Use regulations in zoning categorize allowed land uses as principal, accessory, secondary or special. A ***principal*** use is allowed as-of-right on a parcel, while ***accessory*** uses are allowed if they serve the principal use while being subordinate, incidental to, and customarily found in connection with that principal use.

In contrast to an accessory use, a ***secondary*** use is another one on a parcel that is not a subordinate use; instead, it rises to the level of a second principal use and is also allowed as-of-right. Finally, a ***special*** use is a principal use of the land that is not as-of-right. Special uses must meet certain conditions and undergo a special use approval process before being permitted. When updating use regulations to permit solar energy, a municipality should add each defined system as one of these use types in appropriate zoning districts. Following are the four use types as they relate specifically to solar energy systems:

Principal Use

In most municipalities, one principal use is permitted on each building site. Typically, a solar energy system is considered a principal use when most or all of the energy produced is consumed offsite. Often, such a system consists of a large-scale, ground-mounted solar field. This may raise concerns regarding land disturbance, increased impervious surfaces, and aesthetic consequences. Large solar farms with greater impacts are usually permitted only in industrial, agricultural or similar districts.

Accessory Use

A solar energy system is an accessory use when it generates power solely for onsite use to benefit the principal use of the land. Often, a solar energy system identified as an accessory use is small-scale, roof- or ground-mounted and is designed to supply energy for a principal use on a residential, commercial or mixed-use parcel. Municipalities may choose to allow these systems in all zones because they meet the qualifications of the general definition for an accessory use. For example, New Rochelle allows certain small-scale, roof-mounted systems as accessory uses, requiring only a building permit for solar energy collectors on one- or two-family

dwellings, as well as those covering less than 1,000 square feet of the roof area of other buildings.

Special Use

Where appropriate, zoning can designate a solar energy system as a special use. In these cases, the special use is a principal use allowed, but conditioned upon compliance with specific requirements imposed to limit any negative effects on adjacent properties and the community. For example, a community may require special use permits to ensure a screening or noise attenuation of certain solar energy systems in sensitive locations. If an applicant can demonstrate conclusively that the project complies with all conditions, and that no negative impact will result, the special use permit is usually granted.

Land Use Review Options for Solar Energy Systems

Zoning codes contain provisions that subject various land use proposals to a review and approval process involving local administrative officials and land use boards. The local legislature is responsible for zoning code amendments to permit various types of solar energy systems. In most cases, the planning board is responsible for review and approval of special use permits, as well as site plan and subdivision applications involving solar energy systems. In some cases, the zoning board of appeals may be the approval body.

Zoning code provisions that express project review and approval requirements generally intensify as impacts associated with permitted solar energy systems increase. For example, smaller systems with few or no land use impacts may be exempt from review or enjoy a streamlined administrative review process with fewer standards, while larger systems require a more rigorous, time-consuming and intense review process before one or more local boards.

Because they have few or no land use impacts, municipalities often exempt building-integrated solar energy systems from board review, requiring only a building permit. As a component of the principal use, building-integrated systems are subject only to building code compliance. In these cases, the application is approved administratively through the building permit process in which the inspector ensures compliance with the building, electrical, and other codes.

The review process is similarly uncomplicated for small-scale systems that are accessory uses, such as a roof-mounted system on a house in a residential district. Small-scale systems allowed as accessory uses generally require review by the zoning enforcement officer to ensure that the system complies with relevant use, bulk and area, and other zoning requirements. If compliant, such systems are approved administratively through the building permit process.

To streamline the review process for small-scale, roof-mounted solar energy systems, municipalities can adopt the NY-Sun Unified Solar Permit (USP), which expedites the process of obtaining a building permit. If a system qualifies for the USP, it is run through an accelerated 14-day approval process. To be eligible, systems must have a rated capacity of 12 kW or less, cannot be subject to an architectural or historical review board, must not need a zoning variance or special/conditional use permit, and must be roof-mounted, compliant with building and related codes, and meet mounting and weight distribution requirements, among others. Along with the application, USP applicants must submit an eligibility checklist, a set of plans including a site plan, a one- or three-line electrical diagram, specification sheets for manufactured components, and a permit fee. Municipalities that adopt the USP become eligible for grants between $2,500-$5,000 (depending on population), to implement the new procedures through NYSERDA's "Cleaner, Greener Communities" program.

Larger solar energy systems with greater potential land use impacts may require heightened review. In these cases, a municipality can subject them to site plan approval if they exceed certain thresholds for size, total lot coverage, height, energy capacity or energy usage. Major site plan review is frequently required for ground-mounted principal use systems with large impacts such as land disturbance, increased impervious surface and aesthetic consequences. (Minor site plan review has fewer requirements and is appropriate for medium-sized systems with reduced impacts.) As an alternative, local governments can allow solar energy systems with greater potential land use impacts as special uses; the planning or zoning board must review proposed special uses to determine whether they meet required permit regulations designed to minimize negative impacts.

Development Standards for Solar Energy Systems

Beyond bulk and area requirements or waivers, some municipalities impose specific development standards to mitigate land use impacts associated with solar energy systems, requiring applicants to adhere to these standards prior to granting approvals. As with bulk and area requirements, a municipality should adopt development standards that avoid creating unnecessary burdens for solar energy system development. These standards vary according to system and approval type, with more stringent requirements associated with greater land use impacts. To minimize the visual impacts of roof-mounted accessory use systems, a local government may impose maximum height requirements, solar panel tilt or angle provisions, equipment placement within building envelope, and color or location restrictions that prevent system visibility from a public right-of-way. Setback limits or maximum height requirements may also be imposed, as well as requirements that screen a system from public view.

Jessica Bacher will present much more on the topic of zoning for solar use at the 2016 NYPF Planning & Zoning Conference, April 17th-19th at the Gideon Putnam Hotel in Saratoga Springs. Information for this article was excerpted from "Zoning for Local Energy: Resource Guide," a document created by Jessica Bacher and John Nolon of the Land Use Law Center at Pace Law School, through the Law Center's work under the NY-Sun PV Trainers Network.

Moratoria: A Controversial Land Use Tool

By: Robert H. Feller, Esq., Bond, Schoeneck & King, PLLC

A moratorium, or stop-gap zoning as it is sometimes referred to in the context of local actions, can be an important tool in a local government's regulatory arsenal. Hailed by those who want to slow down growth and feared by supporters of development, the rules governing the use of moratoria are not always well understood.

Why Use A Moratorium?

We live in a society where land use patterns occur principally due to decisions in the private sector. Government regulates and incentivizes these decisions but does not plan them. As a result, there is sometimes a lag between changes in land use patterns and any needed regulatory response.

When a governmental authority is concerned that existing regulatory controls may not be appropriate for changing land use patterns, it will generally begin a process of updating its comprehensive plan which will ultimately manifest in more appropriate controls. However, changing land use rules can be a cumbersome process. Aside from achieving a consensus on the change, there are many procedural requirements that must be met. A community may have to update or adopt a comprehensive plan and conduct environmental impact reviews together with public hearings. As a result, it may take months or even longer before changes are finalized.

Sensing the possibility of a change, land owners and developers may want to take advantage of existing land use rules to get project approvals. Due to the delay between concept and implementation, the objectives of the new land use rules can be seriously undermined by projects that are already in the pipeline or rushed into the pipeline in a race to beat the clock.

This is where the moratorium comes into play. The moratorium is a legal way of calling a time out on land use development in areas where the rules may change. It freezes the progress of projects for a period of time. In theory, that period of time is used by the locality to make decisions on new land use rules and implement those decisions. When the processing of the project review becomes "unfrozen" there are a new set of land use rules that apply. Some projects that were in the pipeline may well be able to proceed, albeit somewhat delayed, while others may have to undergo major modifications or be abandoned altogether.

Recent Moratoria

There has been a spate of moratoria in past few years regarding a relatively new technique to extract petroleum products known as high-volume hydraulic fracturing (commonly referred to as "hydro-fracking"). New York State imposed a moratorium on the use of this technique pending a study of its environmental and health impacts. In addition, many local governments imposed moratoria relying upon their zoning and land use regulatory powers.

Both the hydro-fracking and many other moratoria have two features in common. These are a significant change is the pattern of regulated activities **and** the need to maintain the status quo until **permanent** regulatory changes can be put in place. Where the regulator does know the proper response, the moratorium might be needed to maintain the status quo through a period of study and investigation. However, moratoria can still be needed even if the needed regulatory response is well understood because of the time consumed in adopting code changes.

It is less frequent but still possible to need a moratorium where there are no changes in land use patterns. Updates to a comprehensive plan can sometimes lead a local government to take action to reverse existing land use trends, some of which may even be long-standing. Here, too, a moratorium may be appropriate if there is a need to maintain the status quo until the changes can be put into effect.

Legal Requirements

The following are the basic parameters for enacting and implementing a local land use moratorium.

What are the procedures for enacting a moratorium? New York State law contains no explicit provisions for enacting a moratorium. However, courts have held that a land use moratorium constitutes an amendment to the local code. Therefore, if adopted as a local law or ordinance, the respective procedures would apply [Municipal Home Rule Law Article 3; Town Law Article 9]. If the moratorium amends the zoning code, as opposed to other local land use laws, any additional procedures that apply for amending the zoning code apply [See Town Law §§264 and 265; Village Law §§7-706 and 7-707; General City Law §83]. In the case of cities, charter provisions should also be reviewed. The

proposed moratorium must be referred to the county planning board for a recommendation, or where no such board exists, to the regional planning council [General Municipal Law §239-m(3)(a)(ii)].

Interestingly, the imposition of a moratorium is listed as a Type II action for purposes of the State Environmental Quality Review Act [6 NYCRR 617.5(b)(30)]. Therefore, no review of its potential environmental impacts is required. The fact that moratoria can be enacted without any SEQRA compliance leads some property rights advocates to express concern about the speed and ease with which a moratorium can be implemented.

Who is authorized to enact a moratorium?

Because a land-moratorium must be adopted as a local law or ordinance, only the governing body can take action. Planning and zoning boards have no power to do so. However, if a local land use board identifies an issue that may warrant the adoption of a moratorium, it can and should pass that information to the governing body.

What will the moratorium affect?

The moratorium should clearly identify the regulatory actions that are affected. It can be applied to specific uses, bulk requirements, geographic areas, or types of approvals (e.g. subdivisions) or to any combination of the above.

What happens to projects in the pipeline?

A moratorium will always affect new projects but the municipality will have to decide whether it applies to projects in the pipeline. If the municipality wants to exempt project in the pipeline, it should set a bright line for determining when the moratorium applies (e.g. only projects that have not been publicly noticed). Where the line is drawn involves a balance of equities that may take into account the projected length of the moratorium, the size of the pending projects, and the sensitivity of the affected area to development.

How long can the moratorium last?

There are no black and white rules governing the length of a moratorium. In general the courts have stated that the length of time must be "reasonable."[1] What is reasonable depends on the specific circumstances that give rise to the moratorium. If the problem is discrete and capable of solution within a six-month period, a moratorium that lasts for years is not likely to withstand a legal challenge. Moratoria can be extended subject to the same rule of reason.

Special attention needs to be paid to any moratorium which suspends subdivision approvals because Town Law §276 provides that proposed subdivisions are approved by default in not acted upon within 62 days. To be effective, the moratorium must be enacted by a local law which identifies the fact that the town is exercises its powers under the Municipal Home Rule Law to supersede the default period established by §276.

Once a moratorium is imposed, the local government is obligated to tackle the issue giving rise to it. Inaction on a municipality's part will also make the moratorium vulnerable and will make it more difficult to extend the term of the moratorium.[2]

Can an applicant obtain relief from a moratorium while it is still in effect?

The same rules that apply to variances (zoning requirements) and waivers (set forth in the local code) will apply to obtaining relief from a moratorium. It is still unsettled whether a municipality can establish a separate set of criteria for granting a variance from a moratorium (i.e. criteria different from those set in state law for granting use and area variances) if the requirement that is to be varied is in the nature of a zoning law or if the procedures for doing so must be the same. However, in one case where the substance of the variance decision but not its procedures were at issue, the town board reserved to itself, instead of the zoning board of appeals, the right to grant variances from the moratorium.[3]

Conclusion

The use of a land use moratorium often raises strong emotions on both sides of the argument. Nonetheless, it is a legitimate land use tool, the absence of which could create significant problems in implementing new land use rules. Municipalities must recognize, however, that it is an extreme measure and should only implement it where needed and, even then, should do so carefully and with a view towards fairly balancing the equities of affected parties.

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[1] Matter of Laurel Realty LLC v. Planning Board of Town of Kent, 40 A.D.3d 857 (2nd Dept. 2007); Mitchell v. Kemp, 176 A.D.2d 859 (2nd Dept. 1991).

[2] Noghrey v. Acampora, 152 A.D.2d 660 (2nd Dept. 1989).

[3] Montgomery Group LLc v. Town of Montgomery, 43 A.D.3d 458 (2nd Dept. 2004).

Rik Scarce to Give NYPF Keynote Address

We are pleased to announce that our 2016 keynote speaker will be Rik Scarce, author of *Creating Sustainable Communities: Lessons from the Hudson River Region* (SUNY Press, 2015), and filmmaker of the parallel documentary, "Sustaining this Place: Creating a New Hudson River Region Landscape." He is a Professor in the Skidmore College Department of Sociology, where he has been a faculty member since 2003 and served as the Department chair from 2010-2014. His specialty courses at Skidmore include Environmental Sociology, Video Ethnography, Contemporary Social Theory, and Political Sociology.

In the book and film, Rik examines what he calls the extraordinary "entrepreneurship" of Hudson region sustainability advocates from all walks of life. The 10,000 square-mile Hudson River drainage is home to dozens of sustainability success stories that he explores in both book and film through 62 interviews with farmers, land use advocates, elected officials, business owners, environmental justice activists, ecologists, historians, and others. Insisting that no similarly-sized area of the U.S. can match the Hudson region for the extent and vibrancy of its sustainability activity, Rik argues that residents and organizations from Mount Marcy to Manhattan can inspire similar community building and ecologically nurturing practices from coast to coast.

His keynote topic, "What do you See: Planning and Landscape (Re) Creation," will discuss ways that local officials can envision and enact laws to protect sustainable landscapes. "Landscapes are more than pretty pictures or synonyms for 'environment,' as in 'urban landscapes,'" he explains. "They are where society meets nature, not only where the results of planning may be seen, but where "new realities" are created.

In addition to his new book and film, Rik has authored three books: Eco-Warriors: Understanding the Radical Environmental Movement (revised edition—Left Coast Press, 2006; original edition—The Noble Press, 1990), Contempt of Court: One Scholar's Battle for Free Speech from Behind Bars (Rowman and Littlefield, 2003), and Fishy Business: Salmon, Biology, and the Social Construction of Nature (Temple University Press, 2000). His other scholarly works include articles and book chapters on the social construction of nature in the law, research ethics, and public participation in regulatory proceedings. Currently, he is filming a documentary tentatively titled Impact: The Rise, Fall and Rebirth of the Barefoot Running Movement.

Rik's Ph.D. in sociology is from Washington State University (1995). His M.A. is from the University of Hawaii (1984), and his B.A. is from Stetson University (1981); both are in political science. He lives in Averill Park, New York, just up the street from the Wynantskill—a minor but direct tributary of the Hudson River.

Rik Scarce's keynote address will begin at 8:30 on Monday morning April 18th at the Gideon Putnam Resort in Saratoga Springs, kicking off two days of training for members of planning boards and ZBAs, as well as professional planners, Code Enforcement Officers and attorneys. Conference registration and information are on the New York Planning Federation website, www.nypf.org. Please contact our office at nypf@nypf.org or call 518 512 5270 with any questions. We look forward to seeing you next spring for our 78th Annual Planning & Zoning Conference.

Micro-alcoholic Production: the New Upstate Tourism Industry

By TJ Kennedy

Following the one-year anniversary of the NY Craft Act and a celebration of the 3rd Annual NYS Wine, Beer, Spirts & Cider Summit, the craft beverage industry is worth exploring.

New York has experienced steady growth in small-scale alcoholic production over the past decade, with an economic boom in recent years; the craft alcoholic beverage industry is one of the fastest growing sectors in the state. Craft beverage producers have created thousands of new jobs, while a growing demand for agriculture is helping revitalize upstate economies. Craft beverage producers also create regional tourism as their products bring visitors to vineyards, orchards, and farmlands producing local beverages loved by consumers. Part of this success is rooted in various "buy local" campaigns, such as the Taste NY program, but there's more to this modern phenomenon.

In November 2014, New York State enacted a new craft beverage law called the Craft New York Act that reduces burdensome requirements and eases restrictions involved with marketing craft products. To further develop the craft beverage industry and raise awareness for beverage producers, the Governor also launched a series of Craft Beverage Grant programs totaling $3 million for local tourism and promotional marketing.

The Act, which took effect in December 2014, provides great opportunities for local beverage producers to market their products. Its provisions include:

- ✓ Allowing promotional tasting and sampling events;
- ✓ Allowing manufacturers to serve by the glass and by the bottle;
- ✓ Permitting farm distilleries to expand new retail locations;
- ✓ Lowering food consumption requirements during tasting events;
- ✓ Allowing farm distilleries to operate a branch office without requiring a separate license;
- ✓ Reducing the fees for small manufacturers by increasing the production cap.

The $2 million Craft Beverage Marketing and Promotion grant program was created to increase the profile, awareness and sales of state-produced wine, beer, spirits and hard cider. It provides eligible non-profits with matching funds up to $500,000 to help cover the costs associated with marketing the industry. This includes the purchase of recognized media advertising, production costs of print collateral and audio/visual, industry-related tours, marketing materials, and website design, development, and updates. The $1 million grant funding available for Craft Beverage Industry Tourism is designed to help grow tourism by promoting destinations, attractions and special events explicitly related to the craft beverage industry. Working capital funding of up to $250,000 will be awarded by Empire State Development for marketing-based projects intended to create or retain jobs, increase industry tourism and attract visitors to New York State.

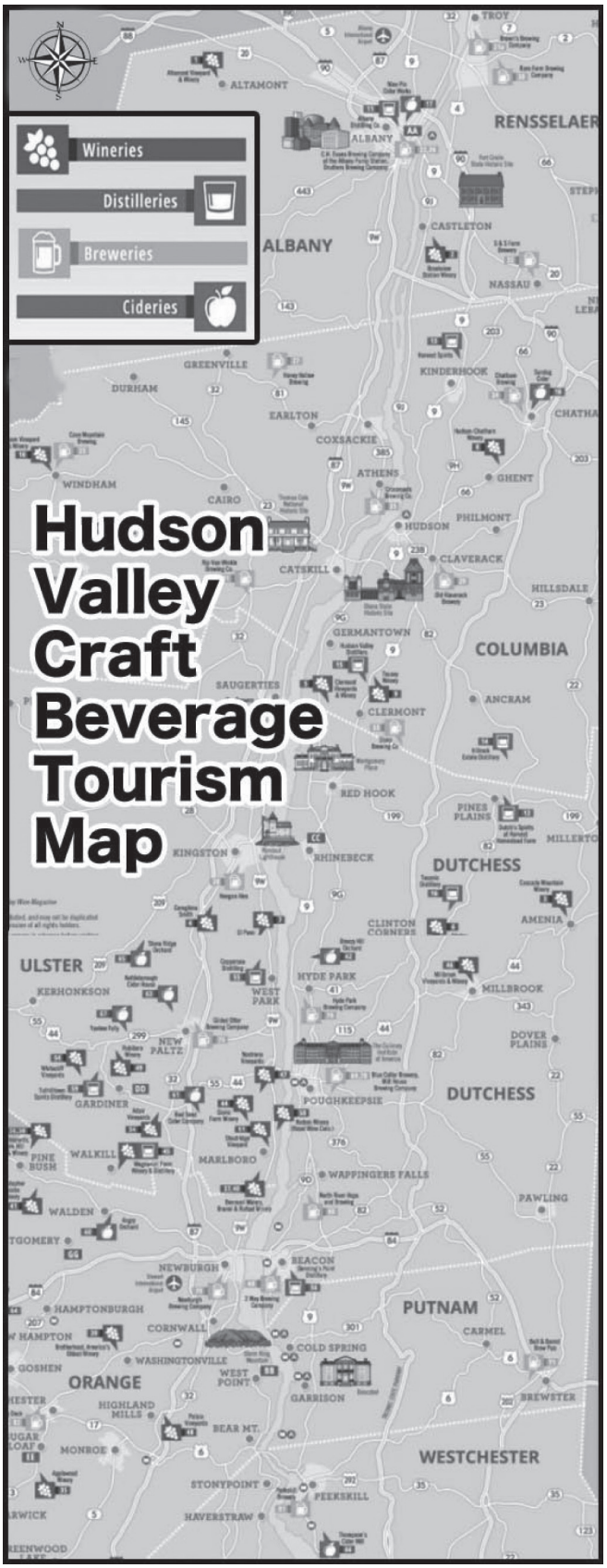
Both the number of farm-based businesses manufacturing wine, beer, spirits and cider with ingredients grown in New York state, and the total number of manufacturers producing alcoholic beverages have more than doubled since 2011. In the past decade, over 200 new farm-based businesses opened

statewide, including 100 new farm wineries, 65 farm breweries, 50 farm distilleries and 10 farm cideries. While these micro-production facilities generally produce smaller volumes of alcoholic beverages than conventional breweries, distilleries and wineries, each individual case should be treated and reviewed separately. There are always variations in terms of the specific thresholds or characteristics that distinguish "micro" producers from their high-volume manufacturers.

Given the current success within the craft beverage industry, each community should be aware of the opportunities and how to be prepared. Relatively few communities have defined and regulated low-volume alcoholic beverage production facilities as a distinct use within their zoning codes. Recent growth in craft brewing and distilling, as well as wine and cider production, has prompted municipalities to update zoning codes in order to offer small-scale producers more options. As demand continues to grow in the future, more communities will amend their codes with new definitions, use permits and use-specific standards for brewpubs, microbreweries, microdistilleries, microwineries and cideries.

A number of communities permit a mix of micro-producers in one or more mixed-use or commercial districts by right or through ministerial review. This method may be more functional than requiring each different type of micro-producer to obtain a discretionary use permit (i.e., a special exception, conditional use, or special use) before locating in a non-industrial district. As it is quite unusual to find use-specific standards for micro-production facilities. Among those communities that added additional standards to their codes, the most common provisions relate to space allocation, outdoor storage, locational criteria or location-based production limits, environmental performance, and compliance with state and local laws related to alcoholic beverage sales.

In order to set clear standards for regulating small-scale alcohol production facilities, your community should have clear use definitions. Some communities define every specific or potential use, while others rely on use grouping use categories for similar operations. Each requirement clearly outlined in a zoning code can clarify and prevent legal disputes over specific uses, but unilaterally creates more regulations. Defining and



regulating small-scale alcohol production facilities allows communities to permit small breweries, distilleries, and wineries in locations that would be inappropriate for conventional, large-scale facilities.

Most conventional zoning codes use different approaches, with broad use categories and specific use definitions under each category. Communities that have outlined specific definitions for small-scale alcohol production facilities generally take one of two following approaches: either define brewpubs, microbreweries, microdistilleries, and microwineries as distinct uses, or define an umbrella term that encompasses multiple types of production facilities. Local governments can provide permit by right to communicate to potential developers and business owners which use is desirable in a certain zoning district. The "permit by right" approach presents the fewest hoops to jump through for applicants seeking to obtain zoning approval, aside from requirements from state licensing or permitting laws.

With use definitions that communicate community support in certain zoning districts, there can also be conditional objective standards in place to minimize negative impacts. Another approach would require ministerial approval, whereby planning staff has an opportunity to review an application before a permit is issued. Often, communities use ministerial approval processes to confirm that a particular application conforms to use-specific standards. Since brewpubs typically hold more in common with restaurants than an industrial factory, many communities permit brewpubs either by right or with ministerial approval in commercial and mixed use districts.

When municipalities define and regulate small-scale alcohol production facilities as distinct uses, they position themselves to capitalize on benefits of new establishments. New definitions and updates to zoning can permit uses in locations that would be inappropriate for major industrial operations, and communities that lack the proper regulatory alternatives for brewpubs and micro-producers run the risk of being unprepared for an application involving a new facility that may be great, but that is inconsistent with current zoning. Another suggestion is for local planning and zoning board members to talk to other communities that have taken a similar approach to see what works and what needs adjustment.

For Reference:

Office of Governor Andrew M. Cuomo. (November 3, 2014). Press Release: "New law will cut burdensome requirements for producers and provide funding for marketing New York craft beverages" https://www.governor.ny.gov/news/governor-cuomo-signs-craft-new-york-act-and-announces-3-million-promotional-funds-further-raise

Town of Hamburg. Zoning Code Amendment Proposal for Craft Breweries: http://www.townofhamburgny.com/Craft_Breweries_Code_Amendment_11-12.pdf

Cidery Locator Map: http://www.nycider.com/hard-cider

The author, T. J. Kennedy, is an intern at the New York Planning Federation. A session on zoning for micro-alcohol production is planned for the 2016 NYPF conference next April 17-19 at the Gideon Putnam Resort.

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