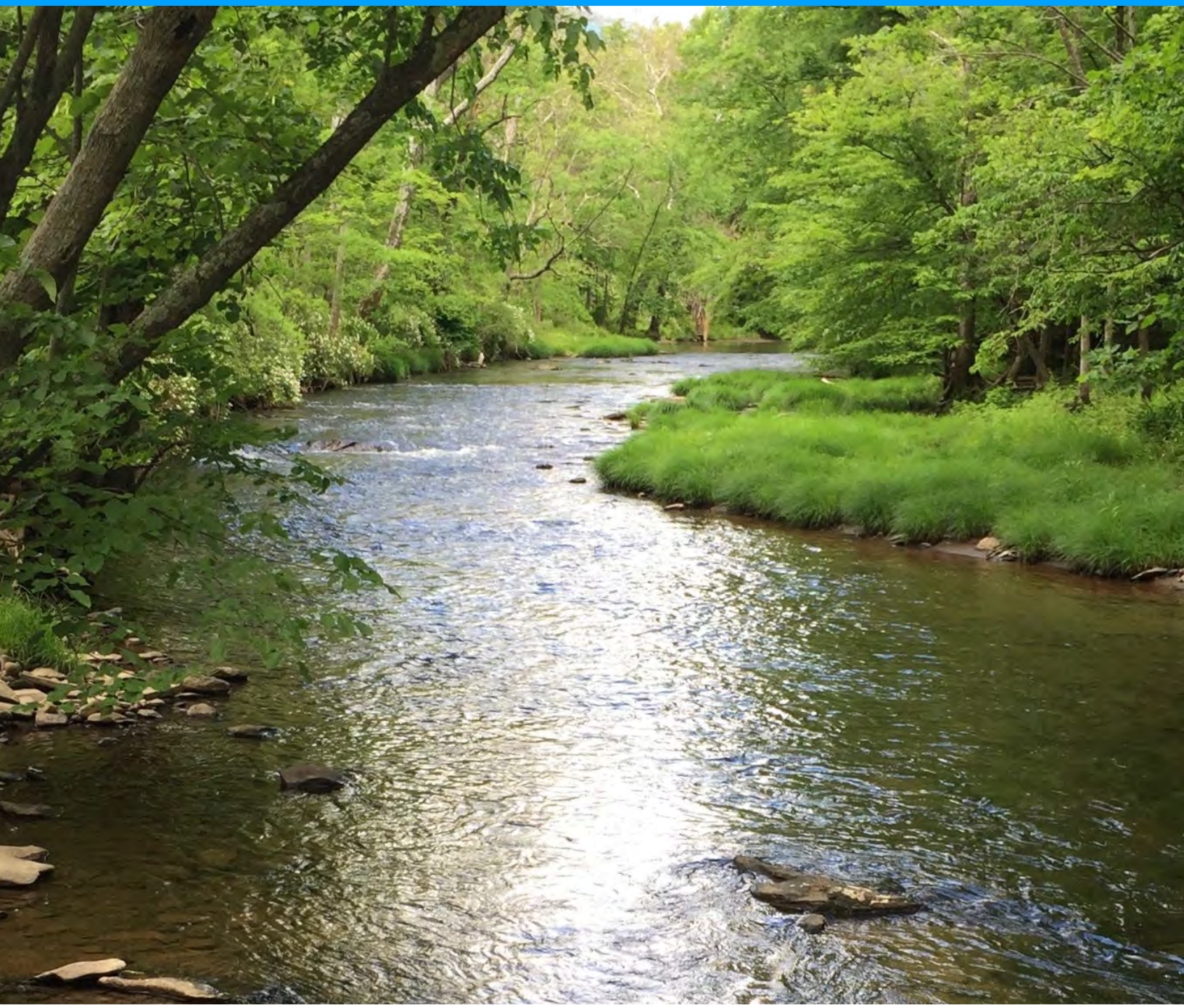




# Creating Conservation Overlay Zoning

A Guide for Communities in the Hudson River Estuary Watershed





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A Guide for Communities in the Hudson River Estuary Watershed

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Cornell University



Department of  
Environmental  
Conservation

Hudson River  
Estuary Program

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Cover Photos: Jim Esslinger, Ted Fink, Ingrid Haeckel, Emily Svenson



# Chapter 1

## About this Guide

The overall goal of this Guide is to support municipalities interested in using overlay zoning districts as a tool to advance a community's conservation priorities. In this guide, you will learn why environmental conservation is essential to human health, quality of life, and the integrity of the environment in your hometown. You will also learn how communities have used their planning and zoning programs to conserve the natural and cultural environment in their locality, how to create an overlay district, and what legal considerations are essential for creating a legally defensible and effective program.

### WHAT IS OVERLAY ZONING?

In this Guide, an overlay zoning district is an area where special natural or cultural resources are located and where special conservation restrictions are in place to protect the viability of the resources. The district does not generally replace the underlying zoning restrictions but adds additional rules for new development.

Beginning in the early 1990's, the New York State Legislative Commission on Rural Resources created a State Land Use Advisory Committee to oversee a nearly two decade long process to "modernize" the State's antiquated land use laws. As a result of the Commission's recommendations, the New York State Legislature created numerous amendments to the City, Town, Village, and General Municipal laws. This paved the way for local governments to develop new and innovative ways to balance land use development with conservation by using environmental sustainability as a basis for control of land use. The new enabling laws also integrated the State Environmental Quality Review Act (SEQR) with the planning and zoning enabling laws, incorporated state-of-the-art planning tools, and allowed for new regional approaches to intermunicipal natural resource protection. Since then, many Hudson Valley municipalities have successfully used overlay zoning districts to protect natural resources, proving the viability of this tool.

The primary focus of this Guide is on the use of zoning overlay districts because an overlay zoning district can fine-tune zoning rules to protect a specific resource like a water body, wildlife habitat, forest, or a scenic or historic feature. Before moving forward with a conservation overlay zoning district, your community needs to first identify the resources for conservation and identify their significance. The resources can be described in a municipal inventory or plan, such as a comprehensive plan, a natural resource inventory, an open space plan, or a community preservation plan. These and other alternatives that are available for resource protection are also covered

by this Guide. With planning in place, overlay districts are one of the most effective tools available to local government for protecting resources identified as essential to a municipality's character and its environmental health.



Photo: Ted Fink

The overall goals of this Guide are to:

- a) help Hudson River watershed municipalities advance their planning and policy-making to achieve meaningful outcomes in support of local and regional conservation priorities;
- b) conserve water resources and habitats essential to wildlife; and
- c) benefit communities through protection of ecosystem services that support a high quality of life.

## Chapter 2

# Why Conservation Zoning?

The Hudson Valley's rich natural areas — including forests, fields, wetlands, shorelines, and coastal habitats — have supported human communities with abundance for millennia. Local ecosystems provide vital habitat and natural products as well as numerous other benefits from clean water and air to flood control, opportunities for outdoor recreation, scenic beauty and a sense of place. After centuries of expanding settlements, however, the Hudson Valley is at a crossroads. Land use changes and their impacts are cumulative and are now a major driver of global environmental change. Habitat loss and climate change are accelerating the biodiversity crisis, threatening species and ecosystems. Nonpoint sources of pollution continue to expand and contaminate water supplies. Rising sea levels and more intense rainfall present new and heightened flood risks. Many municipalities recognize the need for local natural resource conservation measures to protect sensitive environmental features and reduce risk in developed areas. Overlay zoning is an important tool for proactive municipal land use planning to conserve the environment while avoiding many of the adverse changes associated with growth.

The New York State Department of Environmental Conservation's (DEC) Hudson River Estuary Program helps people enjoy, protect, and conserve the Hudson River and its valley. Created in 1987 through the Hudson River Estuary Management Act, the program focuses on the tidal Hudson and adjacent watershed from the federal dam at Troy to the Verrazano Narrows in New York City. The Estuary Program provides technical assistance and grant funding and conducts scientific research to help environmental organizations and local communities effective stewards of the estuary. Since 2001, the Estuary Program's Conservation and Land Use Team has helped communities to build their capacity for conservation planning to preserve the region's priority lands and waters.

### WHY CONSERVATION PLANNING?

- Guides development to where it is wanted
- Prevents degradation of natural resources
- Preserves scenic beauty
- Preserves agriculture and local food production
- Protects historic places and buildings
- Maintains and enhances the economy
- Improves housing and quality of life for residents

The basic steps of conservation planning include identifying natural assets through processes like a natural resource inventory (NRI) and establishing priorities through map analysis and community comprehensive planning. Local governments can then develop plans, policies, and practices to conserve those priority natural assets. Currently, many Hudson Valley municipalities have completed the NRI and open space prioritization process and seek options to conserve their priority resources. Along with protection and stewardship of private lands, conservation zoning is an effective tool to conserve and manage development in environmentally sensitive areas. This guide highlights some of the best examples in New York of how municipalities have used conservation zoning and other innovative tools to balance conservation and development of land.



Photo: Ted Fink

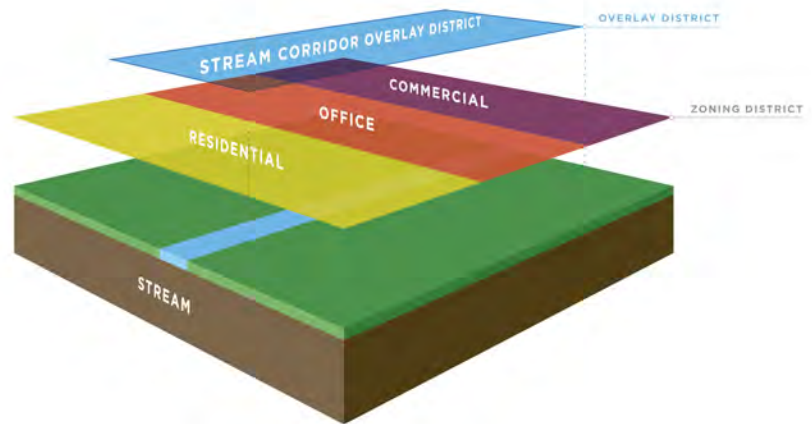
## **WHAT IS AN OVERLAY ZONING DISTRICT?**

Land use in the United States, with a few exceptions, is controlled by local municipalities. In New York State, this means that cities, towns and villages are primarily responsible for determining where different types of land use are established, how they are designed and configured, and their magnitude and density.<sup>1</sup> The State Legislature has created a broad range of planning and zoning techniques that allow local governments to proactively and effectively conserve its important natural areas.



City, town, and village zoning in New York typically divides the municipality into a variety of zoning districts that guide development by regulating the types of land uses and buildings allowed in each part of the community. These districts establish restrictions on the use of land and other limits such as density, height, setbacks, or coverage of structures

permitted by new development or redevelopment. The zoning map shows where in the municipality each zoning district has been established through zoning district lines or the use of color to denote the different zoning districts on the map. Each parcel of land can be identified by which district it is located in and then the rules that apply to each parcel are determined by consulting the zoning text.

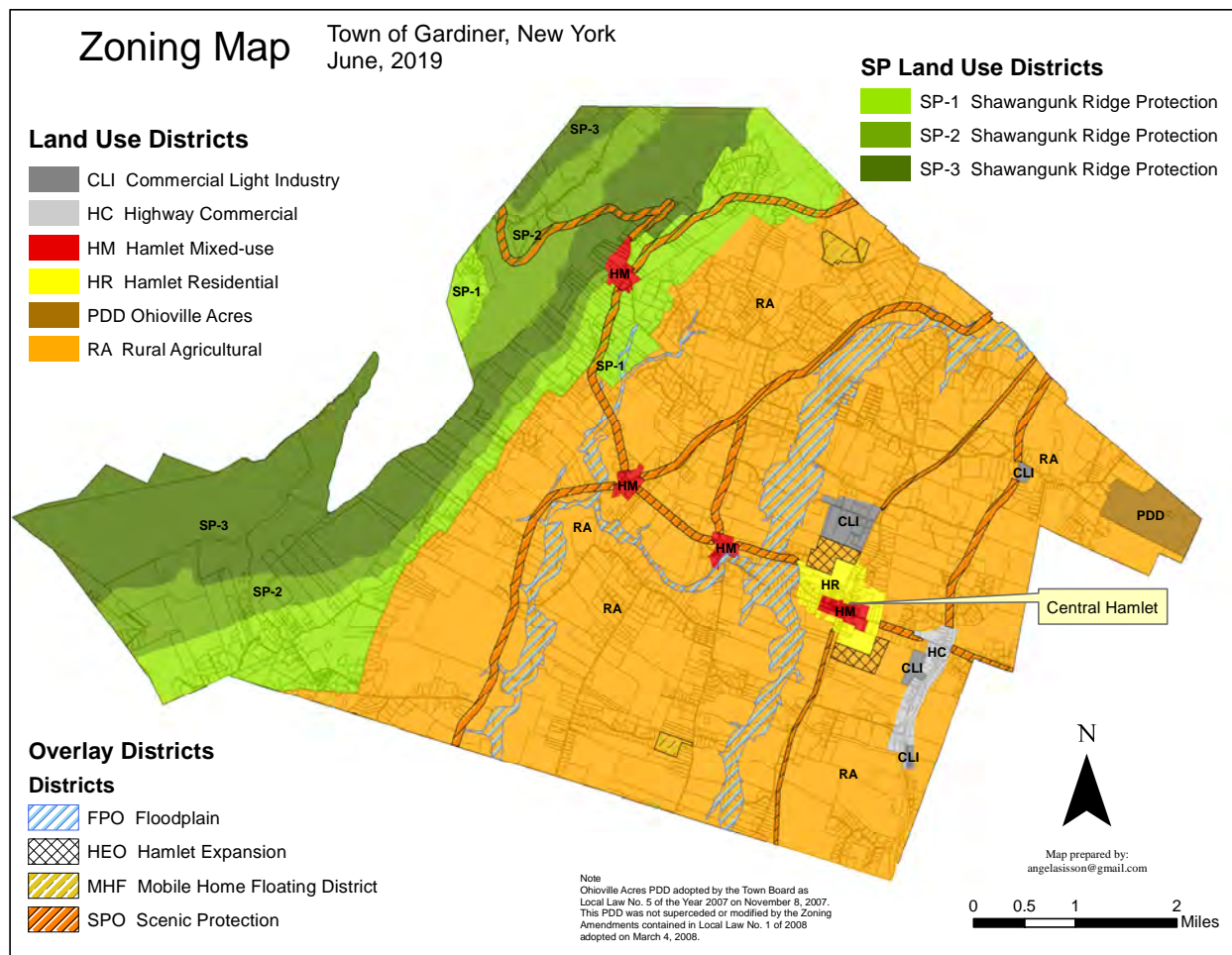


*A stream corridor overlay district creates an additional set of regulations on existing residential, office and commercial zoning districts, designed to protect the stream and its riparian area ecosystems.*

An overlay district is created by identifying a defined area in which an additional set of regulations is added to the zoning district rules. For example, the overlay district may define a special resource area, and within that area, new provisions apply in addition to the other zoning rules imposed by the underlying (or primary) zoning district. Overlay zones can span several primary zoning districts or cover only parts of a zoning district.

In the Hudson Valley, overlay districts have been used by municipalities to conserve a variety of natural resources. They are usually stricter than the existing zoning because they are intended to protect sensitive local environmental features. Overlay districts can also be used where a municipality wishes to encourage specific types of development or to provide a parallel zoning process for certain uses. This Guide is focused on overlay districts for natural resource conservation.

Overlay districts can be a useful strategy to protect natural resources in a community because standard zoning typically focuses on human settlement patterns and not environmental conditions. Standard zoning districts are rarely established with any



*The Town of Gardiner Zoning Map illustrates different types of conservation zoning approaches. Most of the town is divided into traditional zoning districts. The area along the Shawangunk Ridge is assigned to conservation zoning districts with limited uses and strict regulations. Overlay districts are imposed on top of the primary districts to protect floodplains and scenic road corridors that span multiple parts of the town.*

relationship to topography or other natural resource boundaries. For example, a sensitive stream corridor may traverse areas settled as a hamlet, an industrial area and a residential area. Each of those areas might be zoned in accordance with the settlement pattern, but an overlay could add protections for the stream corridor in addition to the primary zoning. A parcel of land located within the overlay district would be subject to two sets of regulations: the primary zoning district requirements plus the overlay district requirements.

## Chapter 3

# Selecting the Right Tool

Overlay districts are a flexible tool that can be used to regulate activities in and around sensitive environmental resources, but they are not the only available tool. This chapter describes appropriate uses for overlay districts, alternative approaches, and some considerations in choosing the tool that fits a municipality's needs.

## WHEN TO USE OVERLAY ZONING

Overlay zoning is well-suited to protect a sensitive resource that appears in multiple locations in the municipality, or in one area that spans multiple primary zoning districts. Resources suited to overlay zoning might include a forested habitat, a significant natural community, a scenic area like a ridge or a viewshed, an important water resource such as an aquifer, a high quality stream corridor, a drinking water source, or a coastal area subject to flooding or vulnerable to sea level rise.



Photo: James Esslinger

For example, if a community relies on a drinking water well, the aquifer recharge area for the well could be delineated as an aquifer protection overlay district. Some of the

land might lie in a residential zoning district, some in an industrial district, and so on, and those primary districts would not change. But the overlay district would add additional restrictions designed to protect the aquifer, like limiting polluting land uses or limiting impervious surfaces that interfere with groundwater recharge. Those rules would apply in addition to the primary district's rules.

Overlay zoning can add substantive restrictions, like changing the allowed uses or dimensional requirements. It can also add process requirements designed to ensure resources are considered and protected, such as an additional requirement for a special use permit for certain activities.

While most overlays specify additional restrictions applicable to new land uses, there are also reasons why a particular overlay district area may be designed to encourage development. See Chapter 7 for more on balancing conservation and growth.

There are some things an overlay district cannot do as follows:

- An overlay district does not avoid the need to comply with zoning change procedures. Since an overlay is a zoning district, it must align with the municipality's comprehensive plan and must be adopted pursuant to all requirements for a zoning amendment. More on this in Chapter 4 and 6.
- An overlay district is generally not used for a single site or parcel of land. In particular, if a zoning change would otherwise be considered “spot zoning,” as defined by the New York State Court of Appeals, labeling it an overlay district does not change this illegal practice.
- An overlay district is not generally optional. There are other zoning techniques, such as floating zoning districts, that are better suited for use as an optional or alternative zoning scheme. Floating zones are appropriate when a municipality wants to encourage a specific use or program but is unsure at what location the market may exist for such uses. The municipality adopts the text for the floating zone district, but it is not mapped onto a particular location until a formal application for a zoning amendment is made (i.e. a zoning map amendment). In contrast, an overlay district is mapped to specified locations when adopted and its rules must be applied to development projects in those locations.



## ALTERNATIVES TO OVERLAY ZONING

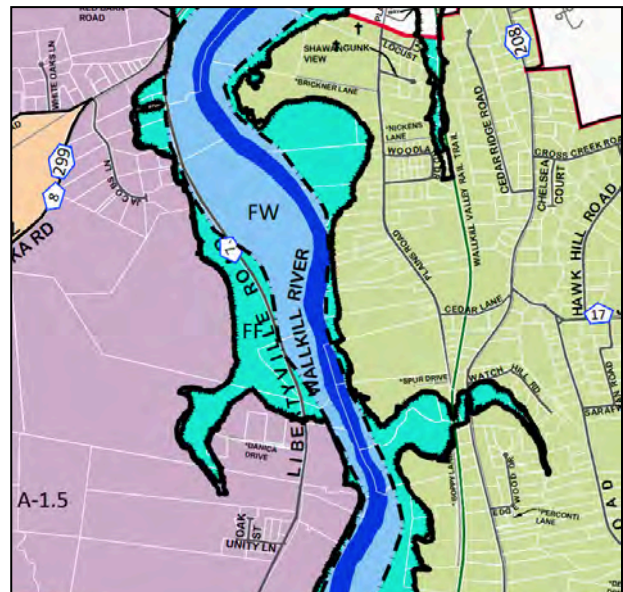
Overlay zoning is only one method of protecting natural resources. Communities should choose the best tool based upon their needs and goals. The following are other planning techniques to consider.

### Conservation district

A municipality may use a conservation zoning district to regulate a sensitive area. Instead of an overlay that spans multiple underlying zoning districts, a primary zoning district can be established that regulates development in an area of particular environmental sensitivity. This conservation district would define allowed uses, density, and other parameters for development in the district. For example, the Town of Gardiner's Shawangunk Ridge Protection districts are restrictive zoning districts on the ridge. (See map in Chapter 2.) The three districts, defined by elevation, allow limited uses, restrict density, and require extra environmental review.

The Town of Rhinebeck created a Historic Preservation (HP) Zoning District for its entire area along the Hudson River within the Hudson River National Historic Landmark District. Specific standards for all new land use applications within the HP District provide guidance to the owners of properties within the District as well as the Town Planning Board and Zoning Board of Appeals.

When considering use of either a conservation district or an overlay district, an overlay district may be a more useful tool if the resource being protected spans diverse areas, like an aquifer that underlies both a hamlet, where businesses are located, and a rural residential area. In contrast, a primary



*This section of the Town of New Paltz zoning map shows the Floodway (blue) and Flood Fringe (aqua) zoning districts along a major river corridor. These conservation districts allow limited uses and impose specific standards. This approach is different from an overlay because Floodway and Flood Fringe are primary districts, not an overlay on top of another primary district.*

conservation zoning district may be preferable for a large sensitive area where there has been little development and future development should be uniformly restricted.

## **Resource protection regulations**

To protect a natural resource that is dispersed throughout the municipality and may be difficult to map, special resource protection regulations may be adopted. For example, steep slopes may be found in small pockets in various locations and they may be impractical to map on a municipal scale. Other resources like wetlands or floodplains are subject to change over time. Certain soils like prime farmland or hydric soils are mapped at large scales, and for more precise boundaries of soil types on privately owned lands, a soil scientist must conduct field studies. These resources may be better regulated with resource protection regulations where detailed field studies are typically performed as part of the application review and approval processes but are impractical on a municipal scale.

These regulations may take the form of a standalone local law (like a wetland or steep slope protection law) or may be integrated into the zoning and subdivision laws. For municipalities that lack zoning, subdivision regulations or site plan review requirements may include resource protection standards for new development.

## **Critical Environmental Areas**

Critical Environmental Areas (CEA) may be used to ensure sensitive resources are considered during SEQR reviews. Establishing a CEA is a means to document the environmental sensitivities or unique features of an area, communicate the community's desire to protect specific resources, and ensure those issues are properly assessed under SEQR and considered as part of the land use review and approval processes when development is proposed within the CEA.

CEAs are typically designated by the local legislative body, but pursuant to state SEQR regulations, CEAs can be established by any agency that conducts SEQR reviews by simple



Photo: Kim Cuppett

resolution following a public hearing.<sup>2</sup> Once entered into the state's database, any SEQR Environmental Assessment Form completed for a project or action within the CEA will automatically be flagged with the CEA designation so that the lead agency can consider the impacts upon the CEA's special attributes in its SEQR review. Compared with other resource protection options, adopting a CEA may be less likely to cause concern or controversy because it does not add any new regulatory restrictions, outside of those substantive requirements that already apply during a SEQR review Conservation Design (or Cluster Development)

In the Hudson Valley and generally throughout New York State, many communities have adopted cluster development regulations, as authorized by enabling laws.<sup>3</sup> The purpose of a cluster development is 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 lands. Where a planning board has been authorized to approve cluster subdivisions in a community, the zoning



Photo: Laura Heady

restrictions can be relaxed in a manner where the subdivision's lots are laid out so the plan results in a significant amount of permanently preserved open space and natural areas on the parcel. However, the permitted number of building lots/dwelling units cannot exceed the number which would be permitted in a conventional subdivision. Some Hudson Valley communities, like the towns of Rhinebeck and Gardiner, require up to 80 percent of the parcel to be preserved as open space and the houses sited on only 20 percent of the parcel through a four step conservation design process.

Some communities use a permissive approach to cluster, where developers are allowed to propose a cluster development and the planning board then modifies the zoning's bulk standards without the necessity of an area variance. Other communities have granted their planning boards the authority to mandate a cluster development when certain factors are present, such as a sensitive environmental resource. Rhinebeck took a slightly different approach to cluster development by designating conservation subdivision a permitted use and conventional subdivision a special permit use. A condition on the approval of the special permit is that the conventional subdivision must be found to be no less protective of the environment than a conservation subdivision would be. In this way, natural resources can be protected while also allowing a density neutral approach to land development. Clustering does

not prevent land development and its impacts on the natural environment but provides for development to occur in partnership with conservation.

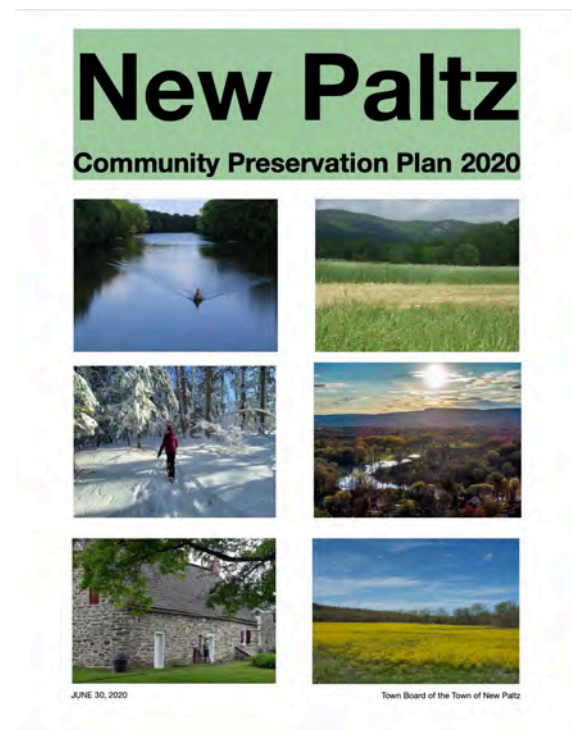
Clustering may be more useful to protect some resources than others. For example, it may be a useful tool to reduce fragmentation in otherwise intact habitat areas. The Wildlife Conservation Society’s “Staying Connected” initiative provides guidance on that use.<sup>4</sup> Clustering may be less valuable to protect resources like aquifers, where clustering development in one area does not necessarily reduce impact. Another limitation to clustering is that it is often only applied to major subdivisions, which may not be common in smaller communities.

## Community Preservation Fund

The approaches above focus on regulating new development. Another option is permanent protection of sensitive lands. Local governments are authorized to spend public funding on the acquisition and maintenance of open space lands under section 247 of General Municipal Law. Funding options for municipalities include grants, private donations, fees, taxes, bonding, and appropriation of general town funds. For more information, see the *Local Open Space Planning Guide*<sup>5</sup> and *Open Lands Acquisition: Local Financing Techniques Under New York State Law*.<sup>6</sup>

Community Preservation Funds (CPF) have become an effective way for municipalities to permanently preserve important natural and cultural resources. This tool permits voluntary acquisition of land and “development rights” on land in identified areas.

To establish a CPF, municipalities must first identify the priorities and goals for open space protection in a Community Preservation Plan (CPP), by identifying lands that contribute to the municipality’s unique community character (broadly defined to include both natural and cultural resources). They must then obtain the consent of voters in





the municipality through a referendum and adopt a local law that implements the program, among other procedures.

The New York State Legislature, through the Hudson Valley Community Preservation Act, has to date granted authority to towns in Putnam, Westchester and (later) Ulster Counties to create CPFs. Other individual municipalities have also received authorization through special state legislation, such as the towns of Red Hook in Dutchess County and Warwick in Orange County, where such programs are now well established and have resulted in protection for thousands of acres of land.

## COMPARISON OF STRATEGIES

The table below provides further guidance on which of the tools above may work best for a particular need. It asks two questions:

### 1. WHERE IS THE RESOURCE LOCATED?

**Consolidated area** — A single, defined land area that comprises a valuable resource or contains a concentration of valuable resources

*Examples:* Aquifer recharge area, wetland complex, historic district

**Mappable areas** — Resources that are in multiple locations in the municipality in known areas or corridors that can be identified and mapped

*Examples:* Stream corridors, forests, ridge lines, scenic roads

**Dispersed** — Resources that are found in pockets in various areas of the municipality and may be difficult to predict or map without field investigation.

*Examples:* Steep slopes, vernal pools, historic structures

### 2. WHAT IS THE LEVEL OF POLITICAL WILL TO ENACT PROTECTION?

All of these strategies require action by the local legislative body, either a town board, village board or city council. Some regulations may be more feasible when the legislative body has a strong will to promote conservation despite potential resistance. If the board has less tolerance for controversy, an approach that is less restrictive, involves a smaller area, or affects a smaller class of actions might be preferable. The table on the next page summarizes some of the issues associated with each approach.

Type of Protection	Distribution of Resource	Political Will to Enact Protection
Overlay district	<ul style="list-style-type: none"> <li>- Consolidated area</li> <li>- Mappable areas</li> </ul>	<ul style="list-style-type: none"> <li>- Medium-high (can be added without disturbing remaining zoning, but may restrict development)</li> </ul>
Conservation district	<ul style="list-style-type: none"> <li>- Consolidated area</li> </ul>	<ul style="list-style-type: none"> <li>- High (adding a new, restrictive zoning district in place of an existing district may be controversial)</li> </ul>
Resource protection regulation	<ul style="list-style-type: none"> <li>- Mappable areas</li> <li>- Dispersed</li> </ul>	<ul style="list-style-type: none"> <li>- Medium-high (depends on content of regulation)</li> </ul>
Critical Environmental Area	<ul style="list-style-type: none"> <li>- Consolidated area</li> <li>- Mappable areas</li> </ul>	<ul style="list-style-type: none"> <li>- Low-medium (does not add firm restrictions)</li> </ul>
Conservation design	<ul style="list-style-type: none"> <li>- Any</li> </ul>	<ul style="list-style-type: none"> <li>- Low-medium (does not reduce number of units that can be built)</li> </ul>
Community preservation fund	<ul style="list-style-type: none"> <li>- Any</li> </ul>	<ul style="list-style-type: none"> <li>- Medium (may be incorrectly perceived as a new tax)</li> </ul>

## Chapter 4

# Laying the Groundwork

This chapter covers steps that will form the foundation for creating overlay district regulations:

- Ensuring planning is in place to support the overlay
- Assembling the people and resources needed to develop an overlay

The chapters that follow will guide you through the process of designing and adopting an overlay district.

## LEGAL BASIS FOR OVERLAYS

An overlay district is part of a zoning code and must be adopted by the municipality's legislative body (town board, village board, city council) in accordance with the procedures for amending the zoning code found in the local code or State enabling laws.

State law provides municipalities ample authority to regulate development and protect the environment. Cities, towns and villages are granted the authority to enact zoning by state enabling laws in Town Law, Village Law and General City Law.<sup>7</sup> Municipal Home Rule Law also grants a municipality authority over “[t]he protection and enhancement of its physical and visual environment.”<sup>8</sup> For historic resources, General Municipal Law authorizes municipalities to enact regulations to protect, enhance, and perpetuate districts, sites, and buildings of historic interest or value.<sup>9</sup>

Zoning and planning should go hand-in-hand. The same state enabling laws that grant municipalities the authority to enact zoning place an important caveat on that power: the zoning must be “in accordance with a comprehensive plan.”<sup>10</sup> At the most basic level, this standard requires that a zoning provision does not conflict with the municipality's comprehensive plan. It also calls on a municipality to document the assessment and prioritization that supports the regulation.

## PLANNING FOR RESOURCE PROTECTION

This handbook is intended to guide development of a conservation overlay district after an inventory, analysis, and prioritization of resource protection needs has been

completed. If your municipality has not yet identified the resource or resources needing protection, that planning may take multiple forms.

## Natural Resources Inventory

One of the best tools available to take stock of a municipality's environmental resources is a Natural Resource Inventory. Use of the Hudson River Estuary Program's *Creating a Natural Resources Inventory: A Guide for Communities in the Hudson River Estuary Watershed*<sup>11</sup> is a great place to start. A Natural Resource Inventory (NRI) identifies and describes natural resources at the local scale, providing communities with a strong foundation for proactive planning and informed decision-making. An NRI provides the basis for incorporating resource protection into municipal zoning rules to ensure that healthy, resilient ecosystems are available for present and future generations. The NRI is used to identify and document resources, but your community will then need to take the next step of evaluating which resources or areas are a priority for protection.



Photo: Ted Fink

## Other natural resource plan

Another approach for many municipalities is a plan or report relating to a specific resource. Examples include:

- Open space plan
- Habitat study
- Watershed plan
- Source water assessment

These plans may be produced on the scale of one municipality, part of a municipality, or multiple municipalities. These plans typically involve not only inventory but analysis and prioritization as well. Many include public input on community conservation priorities.

Guidance is available to municipalities for these planning techniques. For water-related planning, the Hudson River Watershed Alliance offers a review of watershed planning guidance.<sup>12</sup> County planning departments may also be a source of guidance. In



Dutchess County, the Department of Planning and Development prepared a countywide Centers and Greenspaces Plan (see Chapter 7) and then helped individual municipalities develop their own centers and greenspaces plans. The Ulster County Department of Planning prepared a countywide Open Space Plan with a goal of coordinating with local municipalities for protecting natural areas in the County.

## Comprehensive Plan

A municipality's comprehensive plan is the place to document the community's goals, principles and priorities for growth and resource protection. A comprehensive plan may specifically identify a resource protection priority that supports adoption of an overlay. If it does not, the rationale for protecting a particular resource or area should be documented, either in a comprehensive plan update or in a separate document. Comprehensive plan updates should be completed in accordance with state law and can be done in concert with a zoning change.<sup>13</sup>



Photo: Laura Heady

As stated above, at a minimum, any zoning update should align with the comprehensive plan. The New York State Department of State guide *Zoning and the Comprehensive Plan*<sup>14</sup> is an informative resource on this requirement.

## **PREPARING TO DEVELOP AND ADOPT AN OVERLAY**

Chapter 5 will provide detail on the design of an overlay district that meets the community's needs. Before embarking on that process, it is helpful to take the following steps.

### **Identify the participants**

Various entities in the community can play a role in developing an overlay proposal.

- The ultimate decision on adopting the overlay will lie with the municipality's legislative body: the town board, village board or city council. That body may or may not take the lead on developing the overlay, but it should be consulted and informed on every step.
- A Conservation Advisory Council (CAC) or Conservation Board is an excellent organization to take part in developing an overlay. A CAC often conducts the planning and analysis leading to recommendations for an overlay, and they may also take the lead in developing the draft regulations.
- Technical assistance is essential. A municipal planner may be a helpful resource in gathering data, producing maps, and recommending protection measures. Often, a consultant is hired for this purpose.
- The zoning enforcement official (e.g. building inspector or zoning administrator) should be consulted both to gather their knowledge on environmental protection challenges and to make sure they will be able to enforce the proposed overlay district regulations.
- The municipal attorney should always be consulted in developing any zoning update.

### **Identify funding or assistance if needed**

The community should consider whether it needs outside assistance to complete the work needed. Questions to ask include:

- Do municipal staff or volunteers have the ability to produce a clear and precise map of the overlay?
- Do municipal staff or volunteers have the expertise to select and draft regulations that are well-tailored to protect the resource in question?
- Does the municipal attorney have the capacity to review and troubleshoot the proposed code?
- Do municipal staff and volunteers have the time to drive the process?

If the answer to any of these is no, the municipality may consider hiring a consultant or consultant team. If the municipality foresees needing consultant services, it may seek grant funding for those services.

Agencies offer grants and other forms of assistance for conservation-related planning and zoning. Options include:

- Hudson River Valley Greenway
- Hudson River Estuary Program
- NYS Department of State Local Waterfront Revitalization Program
- NYS Consolidated Funding Process
- NYS Environmental Bond Fund
- University Environmental Science and Natural Resource departments
- Private foundations

## Chapter 5

# Designing an Overlay

A municipality designing an overlay district will need to answer two main questions:

1. What **area or resource** should the overlay cover?
2. What **regulations** will achieve resource protection goals?

This chapter will help you answer those two questions and develop the map and regulations that form an overlay district law.

As Chapter 4 described, a community should initiate overlay zoning based on a sound planning foundation. Once the important resource or area has been identified, the next step is to map the areas to be included in the overlay. The overlay regulations will apply in these areas.

### Selecting the coverage area

Most overlays are used to protect a class of natural features, such as stream corridors, floodplains, or important habitat, throughout the municipality. Mapping the resource forms the basis for the overlay. A buffer may be included around the resource when needed to achieve protection goals. For example, a stream overlay could include a corridor measured from the centerline of a stream or both banks of a stream. In addition to new rules that would prevent direct impacts to the stream, the overlay could also prevent indirect impacts to the stream through rules affecting land use activities on the upland areas near the stream.

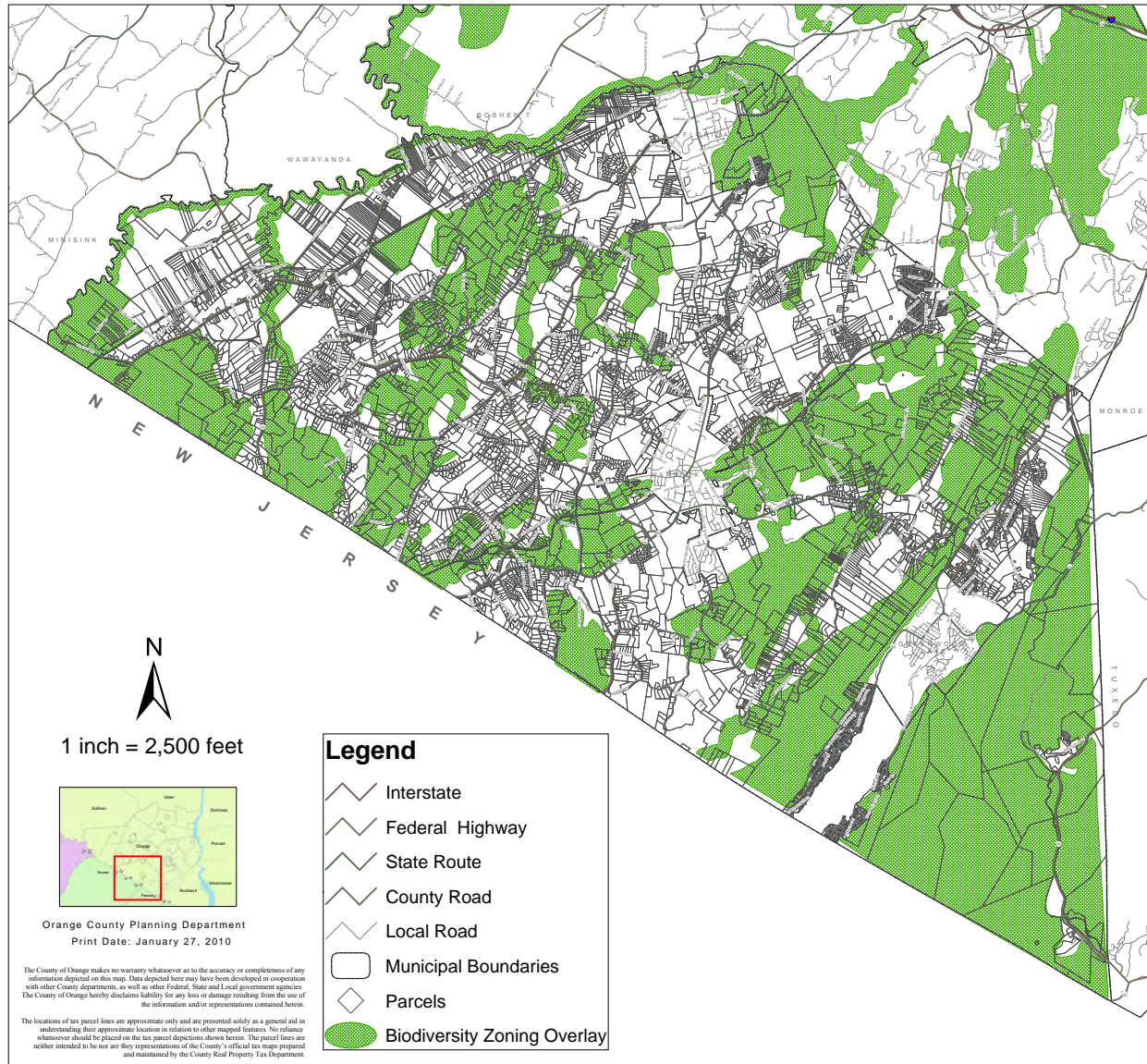
Instead of protecting one resource type throughout the municipality, a community could also identify a single consolidated area that is environmentally sensitive. This may include a large forest ecosystem, an area dotted with wetlands, a ridgeline, or a similar landscape-scale area. To define the overlay boundaries, a GIS practitioner might layer data sets to identify the area of greatest sensitivity. For example, an overlay to protect a large-scale forest might be defined by layering contiguous forest data, habitat mapping and wetland mapping to delineate the optimal overlay boundaries.

The following are a few examples:

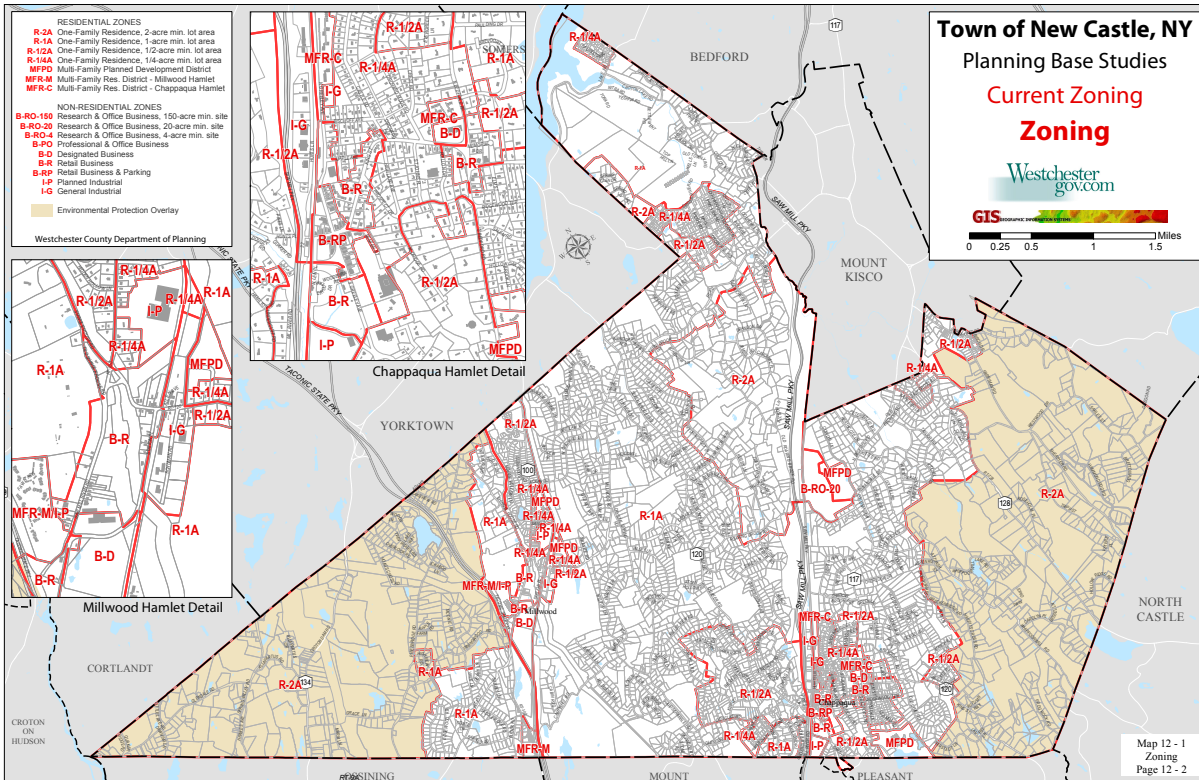


- Warwick's Biodiversity Conservation Overlay District includes patches of habitat throughout the town. It was established based on a regional habitat study<sup>15</sup> that recommended conservation of biodiversity through overlay zoning districts, among other recommendations. An overlay map shows all protected areas, ranging from narrow stream corridors to broad swaths of land.

## Town of Warwick, New York Biodiversity Zoning Overlay



*Warwick's Biodiversity Zoning Overlay covers the areas shown in green. Regional habitat mapping provided the basis for this overlay.*



*The tan shaded areas represent New Castle's Environmental Protection Overlay. These areas are subject to additional protections for wetlands and other natural resources.*

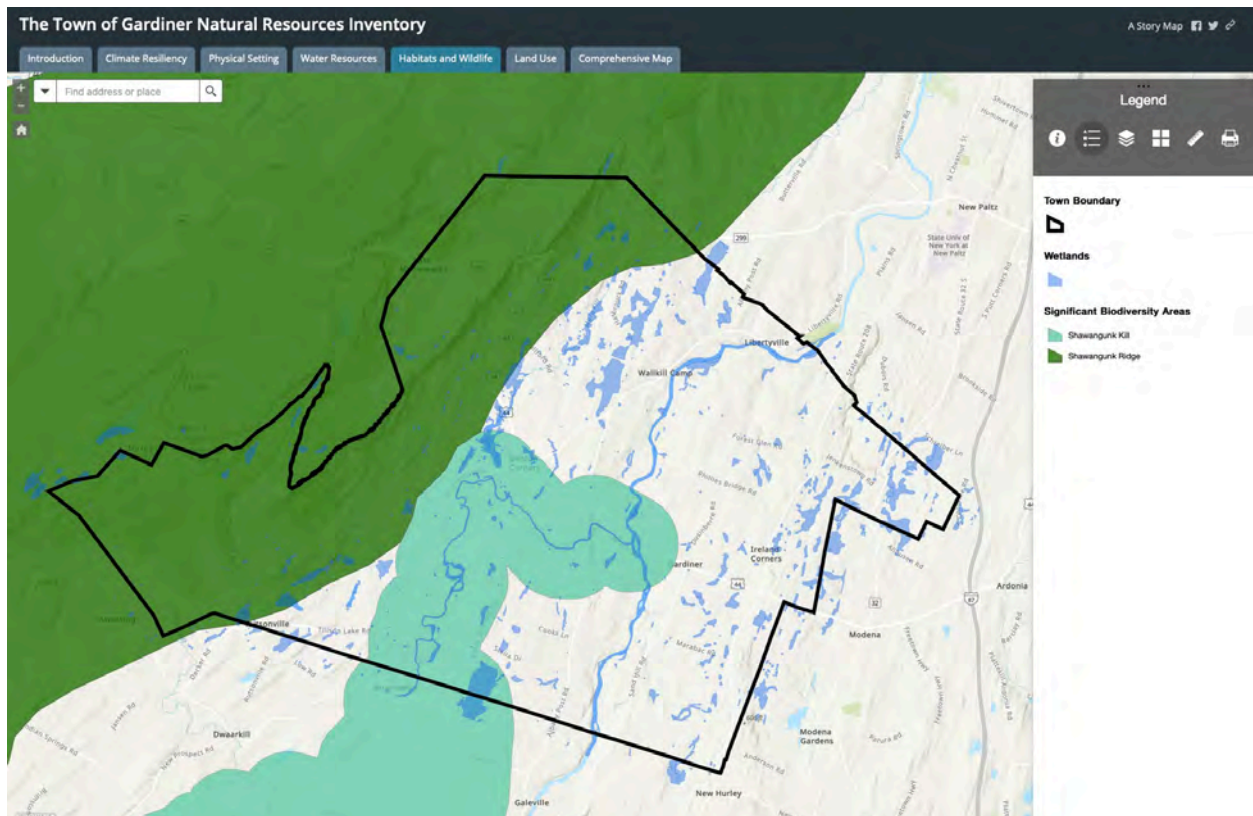
## Mapping the overlay

To create a basic overlay district map, the areas to be protected by the overlay district are layered on a municipal map showing parcel boundaries. It is generally most effective to map the overlay on a separate map from the zoning districts. See, for example, Warwick's zoning map on page 21. But if the zoning is not complex, overlays may be shown on the general zoning map, perhaps using crosshatching, colors, or some other means. An example is Gardiner's Zoning map on page 6.

The following are mapping suggestions:



- Creating a clear map: Create the overlay map in a format and scale that is as clear and unambiguous as possible, preferably at the same scale as the zoning district map. Be sure to show parcel boundaries so property owners can identify whether their property lies wholly or partially within the overlay. When defining the boundaries of a large overlay area, it may be useful to align the overlay boundaries with parcel boundaries to create maximum clarity on which land is subject to the overlay.



The Town of Gardiner has created online interactive Natural Resource Inventory maps that clearly show, at different scales, a variety of natural resources in the community.

- Transparency during adoption: The mapmaking process should be explained so those affected by the imposition of new regulations may examine the basis for the overlay boundaries. Make the original maps accessible to the public via a municipal website to ensure transparency with the scientific basis for the additional regulatory authority.
- Access after adoption: Once the overlay is adopted, the map should be posted on the internet alongside the zoning text. Many communities use [ecode360.com](https://ecode360.com), while others post their zoning code on their municipal website. Either way, the

overlay map should be easily accessible to residents and potential developers so they are aware of the regulations. The maps may also be made available electronically as CAD or PDF files for design professionals to use when laying out site plans or subdivisions.

- Preparing for change: Provisions should be included for amendments to the overlay map so that adjustments can be made in the event of changes in the underlying resource (like floodplains), adjustments based on field verification, or where a landowner may wish to include their property to avail themselves of the benefits of an overlay (see Town of Warwick Agricultural Protection Overlay District below).

## Defining protected features

It is important to decide whether the overlay area will be defined by a fixed map, or if the map serves as guidance subject to field verification. Options include:

- Fixed map is produced as a binding determination of the overlay area
- Guide map is produced, but boundaries are delineated for each site as needed based on application of a resource definition
- No overlay map is produced, and the overlay district text refers to another existing resource map with precise boundaries

A fixed map has the benefit of providing simplicity and predictability, but it may be incomplete. If the overlay boundaries are not defined by a fixed map, then a precise definition of the regulated area and a procedure for delineating it on a case-by-case basis are essential.

The overlay may be defined using criteria that can be identified using other available maps or by observation in the field. For example, a stream corridor overlay might apply to certain streams (based on mapping or physical criteria such as the State's stream classification system i.e. "AA" to "D" streams and so on) and extend outward a specified number of feet from the mean high water levels. The text of the overlay district regulation must carefully define the regulated area.

If an overlay's boundaries are based on criteria that must be delineated in the field, a field survey may be required. For example, an overlay may be based on the boundaries of a wetland, the high water mark of a stream, or a forest with certain tree

characteristics, A provision in the code that specifies how this delineation will be conducted and how disputes will be handled should be included.

Examples:

- The Village of Montebello's Wetlands, Waterbodies and Streams Overlay District includes streams defined by DEC classification, and wetlands defined by physical features. The code makes clear that the overlay is not limited to areas shown on the accompanying map: "The depiction of the boundaries of the W-EPOD overlay on the W-EPOD Generalized Location Map is for general guidance only."<sup>16</sup> The maps are clearly labeled "Generalized Location."
- The Town of Mendon's Environmental Protection Overlay Districts code states: "The Code Enforcement Officer (CEO) shall be responsible for interpreting EPOD boundaries based upon an interpretation of the Official Town of Mendon EPOD Maps, as well as the use of various criteria set forth in this chapter for determining such district boundaries. The CEO may request the assistance of the Town Engineer or other appropriate board in making a determination."<sup>17</sup> The code also establishes an appeals process for CEO decisions.<sup>18</sup>
- The Town of Warwick's Agricultural Protection Overlay (AP-O) District includes most active farms in the Town but the District Map can be amended when a farmer requests Town Board action as follows: "Any landowner whose land has not been mapped on the Town of Warwick Agriculture Protection Overlay District Qualifying Area Map may request to be covered by the regulations of this District. If the Town Board finds that such land satisfies the criteria for AP-O designation in § 164-47.3B(1) above, it may amend the AP-O Map to include such land."
- Warwick's Aquifer Protection Overlay (AQ-O) District allows landowners to petition the Town Board for an overlay zoning map change if they believe their property is not located over an aquifer and should be removed from the overlay district. The section of the code defining how the aquifer area was delineated states: "A landowner may challenge inclusion of land in the AQ-O District by presenting expert evidence provided by a qualified professional based upon on-site investigation. Where such evidence shows, to the Planning Board's satisfaction, that groundwater on the property is not part of such aquifers and aquifer recharge areas, the regulations of this section shall not apply, provided an adjustment of the boundaries of the district shall be made on the official Zoning Map."



## CHOOSING REGULATIONS FOR THE OVERLAY

In addition to selecting the area covered by the overlay, the municipality must select appropriate regulations. Regulations should be based on priorities the community has identified in its planning documents.

Regulations vary depending on the resource and the area covered. The following table shows some examples of protection mechanisms.

Resource	Common methods for protection
Aquifer	Prohibit uses that present pollution risks Require extra stormwater management measures Establish criteria for water consumption
Stream corridor	Prohibit or limit construction in designated corridor Limit vegetation removal Prohibit placement of fill or alteration of stream banks
Floodplain	Prohibit uses that could cause pollution during flooding Limit construction to avoid damage during flooding
Biodiversity	Require habitat assessment to guide land use Cluster new development to avoid habitat fragmentation
Ridgeline	Limit disturbance of steep slopes Restrict vegetation removal Require visual analysis for construction
Historic resources	Require visual analysis for construction in view of resource Restrict demolition and encourage reuse of historic structures
Scenic viewshed	Require review of buildings, lighting, utilities for scenic impact
Farmland	Limit development on important agricultural soils Cluster new construction away from farming activities and avoid good soils to limit impact

The size of the regulated area is also a factor in choosing realistic regulations. A tightly defined floodplain overlay may prohibit construction entirely, while a broad biodiversity overlay might use a process-based approach like require a habitat study to guide development.

The following is a survey of regulation types in various overlay districts in New York State municipalities. They are grouped by substantive restrictions and process-oriented restrictions. Most municipalities' codes are available online, so it is easy to see how the municipalities composed these rules into code.

## Substantive restrictions

Some overlays impose substantive restrictions on development. They may change the dimensional requirements or modify the uses allowed in the primary zoning district. This approach has the benefit of being straightforward to apply. If there is a need to accommodate a variance request, it would need to be made to the Zoning Board of Appeals like any zoning variance, governed at a minimum by the State enabling law criteria for the granting of the variance.

Examples:

- **Prohibition on new construction in resource area:** The Town of Philipstown's Floodplain Overlay covers FEMA-mapped floodplains and prohibits new homes in those floodplains: "no new structure intended for residential use and no new septic tank, leach field, or other sanitary sewage system shall be located within the Floodplain Overlay District."<sup>19</sup> Likewise, the Town of Wallkill's Shawangunk Kill Corridor Preservation Overlay District prohibits most new construction in the stream corridor.<sup>20</sup> Outright prohibitions may be more appropriate when an overlay covers a narrowly defined area, so that construction is not prohibited on entire parcels. Prohibiting construction on entire parcels could raise concerns about government "taking" of land.
- **Density reduction for subdivisions:** In the Town of Saugerties Sensitive Area Overlay District, residential density is reduced by half. The overlay requires: "The minimum lot area and the minimum lot area per dwelling unit shall be twice that set forth in the Area and Bulk Schedule for the underlying district."<sup>21</sup> In other words, if the primary district requires one acre per lot, the overlay would raise that requirement to two acres per lot, reducing the density by half. The Town of Mendon takes a slightly different approach in their Environmental Protection Overlay Districts. Mendon's code creates a "site capacity worksheet" which sets out a formula to reduce the buildable land by a fraction of the land lying within EPODs. The density of the primary district is then applied to the reduced acreage.

- **Impervious surface limitation:** The Town of Fallsburg Neversink River Overlay caps impervious surface at 10% of the parcel area.<sup>22</sup> The Town of Saugerties Sensitive Area Overlay likewise sets a 10% impervious maximum but offers adjustment based on runoff management.<sup>23</sup>
- **Riparian corridor preservation:** The Village of Woodbury Water Quality Protection Overlay regulates watersheds that drain to water supplies. Within the overlay, a 50-foot riparian zone must be preserved along streams and waterbodies, with no vegetation removal or construction.<sup>24</sup>
- **Aesthetic requirements:** The Town of Blooming Grove Ridgeline Overlay establishes limits on building height, lighting, tree removal and other design factors to protect views.<sup>25</sup> The Town of Warwick has similar restrictions in its Ridgeline Overlay and also includes a list of ways to avoid or reduce impacts on viewsheds by requiring extra landscaping, specifying low light reflective values for building colors (but not colors themselves), recommending use of natural materials like wood and stone, and restricting tree removal that would result in clear-cutting and similar practices that impact viewsheds.<sup>26</sup>
- **Prohibit certain uses:** Overlays protecting aquifers and other water resources commonly include a prohibition on certain uses that have the potential to pollute. The Town of Saugerties Aquifer Protection overlay prohibits gas stations, vehicle repair, dry cleaners and numerous other potentially polluting uses.<sup>27</sup> The Town of Rhinebeck Water Resources overlay has similar prohibitions for mapped aquifer areas.<sup>28</sup>

## Process-oriented requirements

An overlay can add processes like resource-specific environmental studies or agency reviews for applications within the overlay. It may provide specific performance standards or a set of findings that are necessary to determine if a project should be allowed in the overlay area. This may take the form of requiring a special use permit (SUP) or site plan approval with resource-specific impact criteria, even for uses that wouldn't otherwise require those reviews.

Examples:

- **Resource-specific assessment:** Applicants proposing development in an overlay district may be required to produce an assessment report specific to the resource of concern. For example, the Town of Warwick's Biodiversity

Conservation Overlay requires review of projects meeting certain size thresholds using the "Biodiversity Assessment Manual for the Hudson River Estuary Corridor."<sup>29</sup> Where a site-specific habitat assessment is needed, the code sets out the required contents of that study. The Town of Blooming Grove Scenic Viewshed Overlay sets out the requirements for a visual assessment, which applicants within the overlay must produce.<sup>30</sup> These reports guide the design and review of the project.

- **Special Use Permit:** The Town of Rhinebeck Water Resources Protection Overlay encompasses floodplains, stream corridors, lakes and ponds, freshwater wetlands and aquifers and aquifer recharge areas. In those areas, any development is subject to review and approval of a special use permit, with criteria to ensure compatibility with resource protection.<sup>31</sup> The Town of Amenia Aquifer Overlay imposes a special use permit requirement for certain potentially polluting uses that would otherwise be allowed in the primary district.<sup>32</sup>
- **Stormwater management:** The Town of Amenia Stream Corridor Overlay requires an erosion and sediment control plan if disturbance exceeds 10,000 square feet.<sup>33</sup>
- **SEQR Type I classification:** The Town of Amenia Aquifer Overlay establishes SEQR Type I status for any project in the overlay in which water consumption would exceed natural recharge.<sup>34</sup> The Town of Philipstown Aquifer Overlay has a similar requirement.<sup>35</sup>
- **Environmental permit:** The Town of Mendon requires a special development permit for any development within one of its Environmental Protection Overlay Districts.<sup>36</sup>
- **Drinking water impact review:** The Town of Philipstown Cold Spring Reservoir Watershed overlay protects the Village of Cold Spring's drinking water supply. The overlay provides application of watershed regulations and allows for review by the Village water department.<sup>37</sup>

Overlays can also provide incentives in exchange for the provision of community benefits. If the community benefits cannot be provided directly by an applicant, the system can also provide for applicants to make cash payments in lieu of the benefit. However, if there is an in lieu system in place, any sums received by the locality must be held in a trust fund to be used solely for the specified community benefits. Zoning incentives, in exchange for the provision of community benefits such as those

addressing a number of environmental issues, have gained traction in many of the communities highlighted in this Guide, such as Warwick, Red Hook, and Rhinebeck.

Warwick grants increased density in a conservation subdivision in exchange for an increased percentage of protected open space, construction of multi-purpose trails, LEED or other energy and environmental building certifications, and common or community septic disposal systems for smaller subdivisions. Providing multiple community benefits increases the density even further. Rhinebeck created a density transfer system where a limited transfer of development rights, from lands of conservation value within these districts, can be transferred to other lands suitable for receiving additional density, but within the overall density standards of the Zoning Law. It also allows for the adaptive reuse of historic structures (for uses not otherwise permitted) in exchange for the provision of community benefits and amenities such as affordable housing.

## COMPONENTS OF AN OVERLAY DISTRICT LAW

There is no set formula for composing an overlay district law, but the following is a list of key components.

*Authority and Purposes:* Cite the NY State Enabling Laws that permits enactment of an overlay district to protect and enhance the physical and visual environment of the municipality. Explain how the overlay district relates to the underlying zoning districts. For example, “The requirements of the overlay district shall be met in addition to requirements specified for development in the primary zoning district.” Make a statement about how a conflict between the overlay district provisions and another part of a municipal code will be resolved and administered. For example, a municipality may state that when conflicts arise, the more stringent rule will apply.

*Overlay Map Establishment:* Refer to the municipal zoning map by section and state how the overlay will be superimposed on the primary zoning district requirements and how the additional requirements will be met by the applicant, prior to project approval. Identify and map the regulated area and reference the map’s location(s) in the code, including an official version that shall be kept up to date.

*Map Amendments:* Identify how field variations/interpretations/appeals will be processed and list any criteria and procedures that will be used in amending the overlay district map.



*Applicability:* Include a statement of applicability for which land use activities are permitted as of right, which are regulated, exempted, or prohibited. State the necessary review procedures and how they will be administered through the subdivision, site plan, special use permit, and zoning variance processes of the municipality.

*Development Standards:* List all required review standards and guidance for the approval of a land use application within the overlay district.

*Required Review Procedures:* Spell out every step needed in order to obtain a permit or approval within the overlay district from the municipal reviewing agency. Explain how the local land use review will be conducted when other agencies, whether local, county, state, or federal, are involved including the SEQR review process. Specify criteria for approval.

*Enforcement:* Refer to the municipal zoning enforcement provisions of the code and whether any additional enforcement measures are attached to the overlay district provisions. Identify enforcement measures if municipal zoning enforcement is weak or missing.

*Definitions:* Define any terms specific to the overlay regulations.

## Chapter 6

# Adopting an Overlay

This chapter provides an overview of the steps involved in adopting an overlay district into a municipality's zoning code and provides tips to ensure the code is robust and enforceable.

## ADOPTION PROCESS

An overlay district is part of a zoning code, and it must be adopted in the same manner as any zoning regulation. One or more overlays can be adopted by local law as a zoning amendment, or overlays can be incorporated into a new or redesigned zoning code. In any circumstance, the basic requirements for adopting zoning regulations must be followed. Municipalities should review the adoption procedures in the zoning enabling laws<sup>38</sup> as well as the general rules for local law adoption in Municipal Home Rule Law.<sup>39</sup> The NYS Department of State Guide *Adopting Zoning for the First Time*<sup>40</sup> reviews the steps, most of which are applicable for both new zoning and zoning changes.

Steps typically include:

- Develop a draft law
- Initiate an environmental review pursuant to SEQR
- Refer the law to the county planning board
- Inform adjoining municipalities
- Hold a public hearing
- Make amendments to the law and repeat steps above as needed
- Legislative board votes on the law
- Publish and file the new law

Environmental review of the zoning amendment pursuant to the State Environmental Quality Review Act is a required step. While SEQR review may seem unnecessary for a law meant to protect natural resources, it is required. The documentation produced in the inventory and planning process leading to the overlay can be a useful resource. The SEQR process can provide an opportunity to examine any unintended consequences and proactively address potential criticisms. For example, Chapter 7 discusses community character and housing supply impacts, which could be studied in a SEQR review to ensure there are no negative impacts.

One Hudson Valley community adopted a steep slope protection regulations only to be challenged in court based on the potential impacts of the new regulation on affordable housing. The court found that the municipality had failed to address this potential impact issue in its SEQR review of the local law. Never fail to take a “hard look” at all potential consequences of a local regulations.

## **CLARITY ENSURES ENFORCEABILITY**

It bears mention here that investing effort in ensuring an overlay regulation is clear and precise will pay dividends in the future. Clarity is essential to effective land use regulation. Although it can be difficult to precisely define the area subject to the law, the activities regulated, and the standards for approval or denial, it is worth the effort to ensure the regulation is clear so that it will be enforceable.

A law must be clear enough so that regulated parties know what is regulated. Courts can find a regulation to be unconstitutionally vague if it “fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited,” or if it is “written in a manner that permits or encourages arbitrary or discriminatory enforcement.”<sup>41</sup> For example, one of the accusations in a lawsuit challenging the Town of New Paltz wetlands law was that it was unconstitutionally vague, in part because it did not provide a map identifying the location of regulated “quality vernal pools.” The Appellate Division held that the law was not unconstitutionally vague because there was a detailed description of “quality vernal pool,” and the town also provided a field inspection to landowners upon request.<sup>42</sup> The town’s work to make sure the rules were clear and transparent proved pivotal in the Court’s decision to uphold the law.

Furthermore, individual parts of a law may be difficult to enforce if they are ambiguous. A property owner resisting regulation will often raise the legal doctrine that zoning regulations must be strictly construed against the municipality, with ambiguity resolved in favor of the property owner.<sup>43</sup> In other words, if the law is ambiguous, the landowner

should get the benefit of the doubt. This can be avoided by cross-checking new zoning text with existing regulations to eliminate conflicts and confusion.

This is not to say that a law must be exhaustive. The Court of Appeals has held, “where it is difficult or impractical for a legislative body to lay down a rule which is both definitive and all-encompassing, a reasonable amount of discretion in the interpretation of the legislative direction may be delegated to an administrative body or official.”<sup>44</sup> For this reason, it is important to clearly designate how interpretations are made and how disputes are resolved.

Finally, in selecting the regulatory language in the overlay district provisions, consider the degree of discretion the words allow. Definitive words like “shall” and “must” provide firm requirements. Conditional language like “may,” “generally,” “to the extent practical,” or similar qualifiers leave open the possibility that the regulation will not be applied. Often a property owner will argue against applying the law, and the reviewing board may find it difficult to insist upon rules that are not definitively written.

For example, in a local case where a new box store was proposed in a scenic overlay district, the applicant objected to a 50-foot width restriction that was phrased: “the length of any façade should generally not exceed 50 feet.” The Planning Board allowed a 71-foot facade. Neighbors challenged the decision, and the appellate court held that the zoning provision “lacks any compulsory language” and the Planning Board did not have to apply it.<sup>45</sup> If the law had been written without the word “generally,” the decision might have been different. Careful crafting of overlay regulations will ensure they can be applied firmly and fairly.

## Chapter 7

# Balancing Conservation and Growth

Overlay districts typically place restrictions on construction and they can be seen as an impediment to new development. But an overlay district can be an important part of implementing a community's vision to guide development to where it is most appropriate while also protecting natural resources. A community can identify priority conservation areas for protection and establish overlay districts in those places while also identifying priority growth areas where real estate development can be encouraged. This is particularly important in communities where affordable housing is scarce, and new residential development is desired, such as already settled hamlets, crossroads, village centers, and downtowns.

Under New York law, zoning amendments must be consistent with the comprehensive plan, which should provide a template for well ordered growth. If a municipality can rely on a plan and zoning that provides for protection of human habitats as well as natural habitats, it should be able to enact ecological protections without substantial impact on social and economic resources.

### **Environmental regulation can be compatible with development**

First, environmental regulation does not necessarily preclude new development, even in areas with protected resources. Developers or landowners may believe overlay districts will limit their individual profitability, but land can usually be developed while working around sensitive resources. For example, in enacting a local law protecting wetlands and watercourses, the Town of New Paltz reviewed the potential that the new regulations would

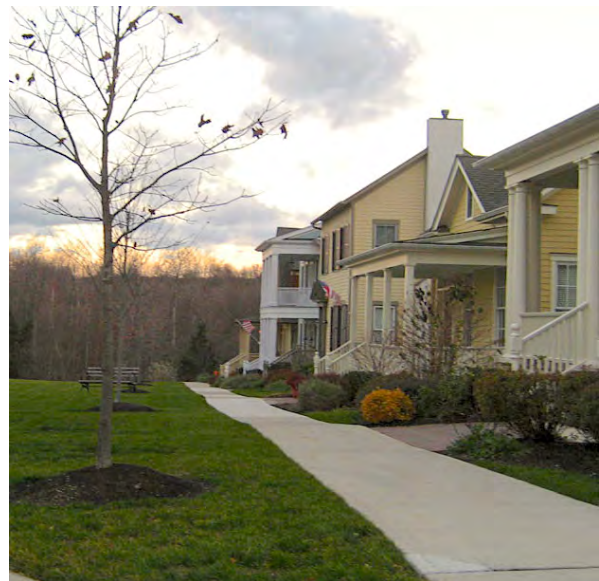


Photo: Ted Fink



render some of its land undevelopable, thereby reducing the property tax base and increasing the tax burden generally on residents. However, a study of the fiscal effects found that even in the worst case assumption that the regulations would render undevelopable all of the wetlands and buffers within the reach of the law (with no permits issued), the reduction in tax base would be 1.2 percent. The Town also reviewed the potential for the law to substantially impair the availability of developable land, or to change patterns of development, and found no discernible impact on either. The New Paltz law and its SEQR review were challenged but both were upheld by the New York State Appellate Division.<sup>46</sup>

More importantly, a resource protection law properly crafted will not reduce development potential or increase costs in the municipality as a whole if the objective is to create density neutral accommodations for new development in a balanced manner as discussed below in the centers and greenspaces discussion. In cases where an overlay district has the effect of restricting development, it is essential to look to smart growth principles as a means of providing balanced growth so that new housing is provided in places where existing infrastructure exists or where it has the potential for expansion to accommodate the additional growth. Smart growth seeks to more concertedly accommodate growth in already settled areas while decreasing the potential for growth in environmentally sensitive areas or where a community seeks to retain the rural character of its fields, forests, habitats, and farms.

A municipality's comprehensive plan should be **the** guide to both protection of the natural environment and the growth of the downtown, hamlet and "main street" areas, and the zoning code should include allowances for multifamily housing as discussed below. Areas of greater density and mixed use are essential to ensure the opportunity for amenities that add to quality of life and provide a host of social and economic benefits to the community.

## **New housing should be accommodated in appropriate locations**

Sound comprehensive planning in a community will include both current and projected needs for housing, the current and projected socio-economic trends of the municipality, and the extent to which accommodations need to be included to provide for affordable housing. Meeting the needs of all residents, including those who seek to establish a new residence in a community, is a basic smart growth strategy and having a policy in place to provide for those needs can preclude charges of exclusionary zoning, which the courts have found to be unconstitutional. This will ensure that individuals, families, a municipality's workforce like school teachers, firefighters, police,

municipal workers, and income restricted seniors can all have an opportunity to live in and remain in a community. All communities have a responsibility to plan for present and future housing needs, both within their municipal boundaries and within the larger region they are a part of, to accommodate affordable housing.

Multifamily housing is a significant regional and legal concern because courts and administrators consider it a central component of inclusionary zoning and affordability. Where a municipality's code does not sufficiently provide for multifamily housing, it can be viewed as an indication of exclusion based on race or economic class, and any local law that results in such shortfall may be annulled by a court.<sup>47</sup>

A good example of planning for both conservation and development in the Hudson Valley is the Centers and Greenspaces plans prepared by 15 Dutchess County communities including Amenia, Beacon, Beekman, Clinton, Hyde Park, Millerton, Northeast, Pine Plains, Pleasant Valley, Red Hook, Rhinebeck, Tivoli, Union Vale, Wappinger, Wappingers Falls.<sup>48</sup> Each of these plans identified areas to be protected and designated as a greenbelt or "greenspace" where priority is given to conservation uses. The plans also identified areas where infrastructure exists (like roads, water, sewer and existing settlements) and identified those "centers" for increased density. In the centers, additional density would occur as new "infill" development within a priority growth area where specified building and street standards encourage compact mixed-use development based upon a walkable concept. Walkability includes complete street designs and the use of form-based codes to achieve a desired form of new development instead of conventional suburban development that may be prescribed by old zoning rules. Desired growth in the centers is facilitated through flexible zoning based on form rather than use, and infrastructure investments and other techniques are added based upon local conditions.

When considering overlay zoning, a municipality can avoid impacts on affordable housing by ensuring that it carefully reviews the potential for such impacts within the scope of a zoning amendment's SEQR review. The SEQR review can highlight any such impacts, document their absence, or identify mitigation measures.

In some cases, it may be appropriate for an overlay to include an exemption to preserve the integrity of areas where dense housing is desired. As an example, many towns concentrate mixed use and multifamily housing zones in their downtowns, hamlets, crossroads, or adjoining a village (village extension) if present within a town. Because watercourses are often the locations for historic settlements, a watercourse overlay zone might make an exception for developed hamlet areas, if the need for more housing at that location outweighs other environmental concerns. This is a time-tested

strategy, as the New York City watershed rules and regulations contain an exception from the prohibition of new pavement and other impervious surfaces near watercourses for sites within a village, hamlet, village extension, or area zoned for commercial or industrial uses in the West of Hudson watershed (generally, in the Catskills) and a "designated main street" area in the East of Hudson watershed in Westchester, Putnam and Dutchess Counties.<sup>49</sup> With careful crafting, a community can accommodate multiple goals for the future, including both environmental protection and ample housing.

## Chapter 8

# Innovative Approaches

The following are some unusual approaches to overlay zoning that may inspire additional ideas.

### **Using a set of overlays for a streamlined process**

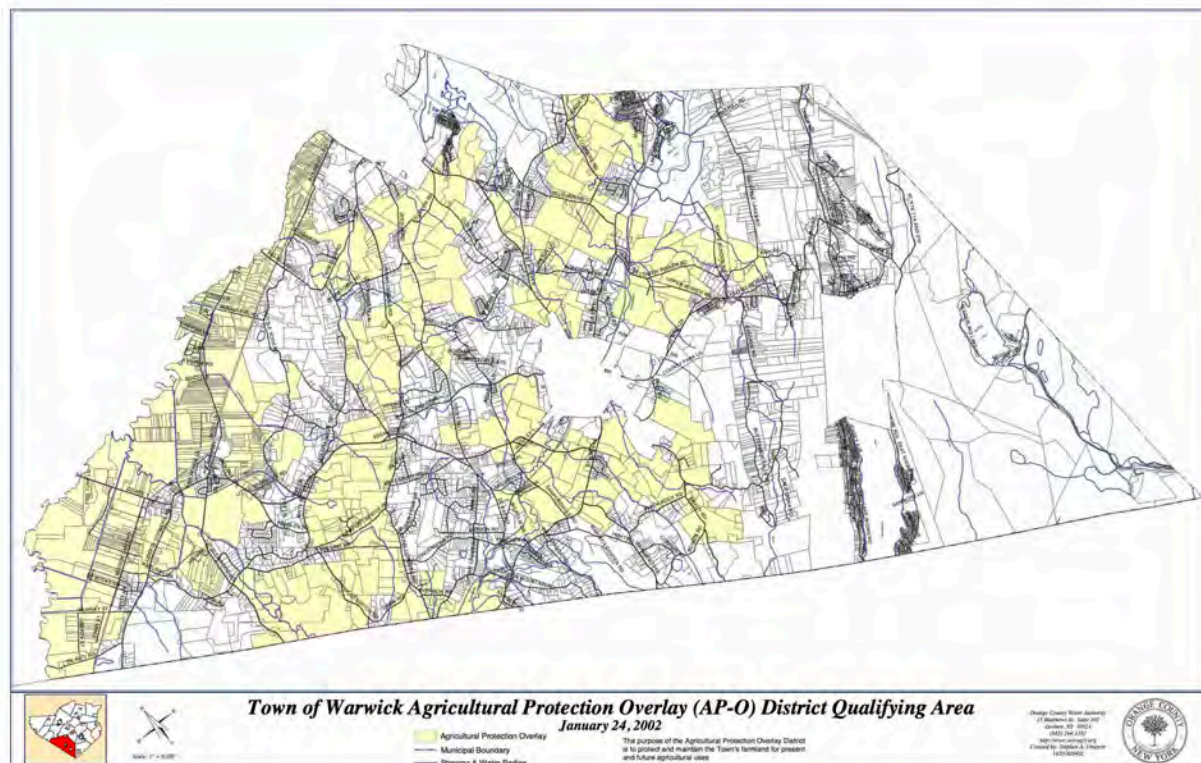
Some communities establish a set of overlay districts, each protecting a different resource, and apply them through a uniform process. For example, in the Town of Mendon, a rural community in western New York, the town has a set of Environmental Protection Overlay Districts (EPODs) covering nine different resources of concern. EPODs cover wetlands, steep slopes, watercourses, scenic vistas, historic and archeological sites, waste disposal sites, woodlots, floodplains, soils susceptible to ponding, and geologic features. Each EPOD is separately mapped and has different regulations, but they are applied through a single system of EPOD development permits. The building inspector reports that more than half of the applications that come in fall within at least one EPOD, so applying EPOD rules is frequent and systematized.

### **Overlays as incentives**

The Town of Warwick adopted a unique approach to encouraging protection of its agricultural resources. The Town Board created an Agricultural Protection Overlay (AP-O) Zoning District containing a critical mass of farmland meeting specific criteria, such as the presence of prime farmland soils, farms within a NY State Agricultural District, operating farms, or farms receiving a farm tax assessment. These are within areas identified as a “Town of Warwick Agricultural Protection Overlay District Qualifying Area” on the official Zoning Districts Map. Any landowner within the “Qualifying Area” may then apply to the Town Board to be included within the AP-O District. Please note that this is different from the discussion above about how Warwick allows farmers to be included in the Agricultural Protection Overlay District Qualifying Area if their farms had not been included from the start of the program.

Once the parcels are officially included in the District, the landowners are subject to specific benefits as well as obligations under the regulations. This includes participation in Town transfer of development rights and purchase of development

rights programs, the Town's open space leasing program, farm market development on the farm, and specified additional development allowances such as certain reduced acreage accommodations for new farmstead dwellings. The restrictions include cluster (conservation) subdivision development and adherence with siting standards that recognize the importance of farms to scenic viewsheds, avoidance of significant habitats and cultural features like stone walls and hedgerows, avoidance and buffering of surface water resources, avoidance of important forests and individual trees, steep slopes, solar electric siting, historic features, and other design principles.



The Town of Greenburgh's Conservation District is labeled as an overlay, in that it modifies the requirements of the underlying zoning district. But it is only applied to land upon request of the landowner. Placement in the Conservation District requires mapping natural features and a commitment to preserve them. In exchange, it offers flexible subdivision options, making it an attractive option for many developers. The town's code does not have a provision for cluster subdivisions, but placement in the Conservation District offers the incentive of flexible lot sizes to achieve conservation goals.



The Town of Amenia's Historic Preservation overlay incentivizes reuse of historic structures by offering additional allowed uses, provided preservation measures are applied.<sup>50</sup> For instance, a building can be converted to multifamily housing, lodging or retail uses, which might not otherwise be allowed in the primary zoning district, if they follow historic preservation requirements. Both Warwick and Rhinebeck have similar requirements for their historic sites and properties.

## **Intermunicipal coordination**

Environmental protection needs that cross municipal boundaries present unique challenges. For example, a municipality may struggle to protect its drinking water reservoirs when the reservoir or its watershed are located outside the municipality that relies on the water. If a municipality that hosts another community's water source or watershed wishes to protect that water source, an overlay can be a helpful resource.

For example, the Town of New Castle's Environmental Protection Overlay<sup>51</sup> establishes two large parts of the municipality that are subject to the overlay. One of the designated areas encompasses the watershed for the Indian Brook Reservoir, the drinking water source for the Village and Town of Ossining. The other area in the overlay is part of the New York City water supply watershed. The overlay preserves natural wetlands in these areas by applying wetland protection rules to smaller wetlands, adding a wider buffer and different permitting requirements.

The Town of Philipstown established a Cold Spring Reservoir Watershed overlay to protect the Village of Cold Spring's reservoir. Within the overlay, projects are checked for compliance with established watershed regulations and other criteria. The overlay takes intermunicipal cooperation a step further by referring all applications to the Cold Spring Village Water Department for review.<sup>52</sup>

## **Enforcement provisions**

As part of the zoning code, most overlays rely on the zoning code's general enforcement provisions. These may include stop work orders, fines, and the like. Some communities add specific enforcement provisions for the overlay.

Examples:

- Conservation easement: The Town of Mendon Environmental Protection Overlay District (EPOD) regulations allow the Planning Board to impose permanent restrictions on future use of portions of a site within EPOD areas when approving

a site plan or subdivision.<sup>53</sup> Mendon's requirement of a permanent restriction has been upheld by the Court of Appeals as not crossing the line into an unconstitutional taking.<sup>54</sup>

- Performance guaranty: The Town of Mendon EPOD regulations also require a developer to submit a letter of credit to ensure compliance with all permit conditions. The funds are only released after conditions are fulfilled, providing an incentive to complete them promptly.
- Fines: The Town of New Castle Environmental Protection Overlay establishes special fines for violation of the overlay district rules.<sup>55</sup> The Town of Wallkill Shawangunk Kill Corridor Preservation Overlay creates a tiered set of fines based on the impact to the river.<sup>56</sup>

## Chapter 9

# Resources

Most municipalities' codes, including most referenced in this guide, are available online through ecode360. Simply search the internet for "ecode" and the name of the municipality, and their code will be accessible.

In particular, the following laws may be helpful models:

- Town of Warwick Biodiversity Conservation Overlay District - § 164-47.9
- Town of Warwick Ridgeline Overlay District - § 164-47.1
- Town of Rhinebeck Water Resources Protection Overlay District - § 125-54
- Town of Amenia Stream Corridor Overlay District - § 121-14
- Town of Amenia Historic Protection Overlay District - § 121-14.2
- Town of Amenia Aquifer Overlay District - § 121-15
- Town of Philipstown Cold Spring Reservoir Watershed Overlay District - § 175-14
- Village of Montebello Environmental Protection Overlay Districts - § 195-63
- Town of Mendon Environmental Protection Overlay Districts - Ch. 138

For a sample wetland and watercourse overlay, please refer to the New York Department of State's Model Laws to Increase Resilience.<sup>57</sup> In that guide's section on Wetland and Watercourse Protection measures, there are sample overlay laws.

## REFERENCES

- <sup>1</sup> New York State is home to one of those exceptions, the Adirondack Park Agency, a State level agency responsible for review of certain land use activities within the Adirondack Park.
- <sup>2</sup> 6 NYCRR 617.14(g).
- <sup>3</sup> General City Law § 37, Town Law § 278, and Village Law § 7-738.
- <sup>4</sup> <http://stayingconnectedinitiative.org/>
- <sup>5</sup> <https://dos.ny.gov/system/files/documents/2021/10/localopenspaceplanningguide.pdf>
- <sup>6</sup> [https://35c3ee68-5874-42b8-b4ad-f358eb480584.filesusr.com/ugd/07aaf7\\_275c6902c48e4dc798bc15cef0b864c0.pdf](https://35c3ee68-5874-42b8-b4ad-f358eb480584.filesusr.com/ugd/07aaf7_275c6902c48e4dc798bc15cef0b864c0.pdf)
- <sup>7</sup> General City Law § 20(25), Town Law § 261, and Village Law § 7-704.
- <sup>8</sup> Municipal Home Rule Law § 10(1)(a)(11).
- <sup>9</sup> General Municipal Law § 119-dd.
- <sup>10</sup> Town Law § 263; Village Law § 7-704. In cities, this is phrased “in accord with a well considered plan.” General City Law §20(25).
- <sup>11</sup> Haeckel, I. and L. Heady. 2014. Department of Natural resources, Cornell University, and New York State Department of Environmental Conservation, Hudson River Estuary Program. Ithaca, N.Y. 102 pp.
- <sup>12</sup> <https://hudsonwatershed.org/watershed-planning/>
- <sup>13</sup> General City Law § 28-a, Town Law § 272-a, and Village Law § 7-722.
- <sup>14</sup> <https://dos.ny.gov/zoning-and-comprehensive-plan>
- <sup>15</sup> Miller, N. A., M. W. Klemens, and J. E. Schmitz. 2005. Southern Wallkill Biodiversity Plan: Balancing development and the environment in the Hudson River Estuary Watershed. MCA Technical Paper No. 8, Metropolitan Conservation Alliance, Wildlife Conservation Society, Bronx, New York.
- <sup>16</sup> Village of Montebello Code § 195-63(2)(b)[1].
- <sup>17</sup> Town of Mendon Code § 138-5.
- <sup>18</sup> Town of Mendon Code § 138-10.
- <sup>19</sup> Town of Philipstown Code § 175-13(C).
- <sup>20</sup> Town of Wallkill Code § 249-106.
- <sup>21</sup> Town of Saugerties Code § 245-24(D)(1).
- <sup>22</sup> Town of Fallsburg Code § 310-29.1(C).
- <sup>23</sup> Town of Saugerties Code §§ 245-24(D)(3), (F)(2).

- <sup>24</sup> Village of Woodbury Code § 310-31.4(F).
- <sup>25</sup> Town of Blooming Grove Code § 235-14.4(4).
- <sup>26</sup> Town of Warwick Code § 164-47.1(F).
- <sup>27</sup> Town of Saugerties Code § 245-25(C).
- <sup>28</sup> Town of Rhinebeck Code § 125-54(D)(1).
- <sup>29</sup> Town of Warwick Code § 164-47.9(B)(2).
- <sup>30</sup> Town of Blooming Grove Code § 235-14.4(B)(3)(c).
- <sup>31</sup> Town of Rhinebeck Code § 125-54(A).
- <sup>32</sup> Town of Amenia Code § 121-15(E).
- <sup>33</sup> Town of Amenia Code § 121-14(F).
- <sup>34</sup> Town of Amenia Code § 121-15(D)(3).
- <sup>35</sup> Town of Philipstown Code § 175-16(D)(4).
- <sup>36</sup> Town of Mendon Code § 138-6.
- <sup>37</sup> Town of Philipstown Code § 175-14.
- <sup>38</sup> Town adoption procedures are in Town Law §§ 264 and 265. Village adoption procedures are in Village Law §§ 7-706 and 7-708. Cities should see City Law § 83 as well as their individual charter.
- <sup>39</sup> Municipal Home Rule Law § 10.
- <sup>40</sup> <https://dos.ny.gov/system/files/documents/2021/10/adopting-zoning-for-the-first-time.pdf>
- <sup>41</sup> *Ulster Home Care, Inc. v Vacco*, 96 NY2d 505, 509 (2001) (internal citations omitted).
- <sup>42</sup> *Gabrielli v Town of New Paltz*, 116 AD3d 1315 (3d Dept 2014).
- <sup>43</sup> *Allen v Adami*, 39 NY2d 275, 277 (1976).
- <sup>44</sup> *Matter of Frishman v Schmidt*, 61 NY2d 823, 825 (1984).
- <sup>45</sup> *Cady v Town of Germantown Planning Board*, 184 AD3d 983 (3d Dept 2020).
- <sup>46</sup> *Matter of Gabrielli v Town of New Paltz*, 116 AD3d 1315 (3d Dept 2014).
- <sup>47</sup> See e.g. *Berenson v Town of New Castle*, 38 N.Y.2d 102 (1975); *Berenson v Town of New Castle*, 67 AD2d 506 (2d Dept 1979); *Land Master Montg I, LLC v Town of Montgomery*, 13 Misc 3d 870, 871-85 (Sup Ct Orange Co 2006), *affd*, 54 AD3d 408 (2d Dept 2008); *Cont. Bldg. Co., Inc. v Town of N. Salem*, 211 AD2d 88 (3d Dept 1995)
- <sup>48</sup> <https://www.dutchessny.gov/Departments/Planning/Centers-Greenspaces.htm>
- <sup>49</sup> See 10 NYCRR 128-3.9(a)(3), (8), (11).
- <sup>50</sup> Town of Amenia § 121-14.2(l).

<sup>51</sup> Town of New Castle Code Ch. 64.

<sup>52</sup> Town of Philipstown Code § 175-14(E)(1).

<sup>53</sup> Town of Mendon Code § 138-9.

<sup>54</sup> *Smith v Town of Mendon*, 4 NY3d 1 (2004).

<sup>55</sup> Town of New Castle Code § 64-9.

<sup>56</sup> Town of Wallkill Code § 249-108(C).

<sup>57</sup> <https://dos.ny.gov/model-local-laws-increase-resilience>