
Municipal Guide to NYS General Municipal Law §239: Required Planning, Zoning, and Subdivision Referrals

**Orange County
Department of Planning**
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**Edward A. Diana, County Executive
David E. Church, AICP, Commissioner of Planning**

Orange County Department of Planning
124 Main Street, Goshen, New York 10924
845-615-3840

www.orangecountygov.com/planning

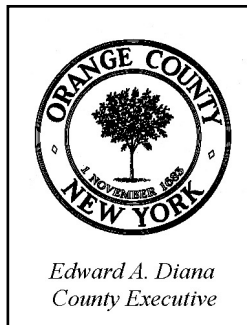


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I. The General Municipal Law §239 Referral Process

This *Municipal Guide to NYS General Municipal Law §239* has been prepared by the Orange County Planning Department (“County Planning”) in order to help local municipalities understand New York State General Municipal Law §239-1, m & n and how the referral process typically works in Orange County, NY. The *Guide* will describe: what types of projects need to be referred to County Planning, the purpose of referral, how and when projects should be referred, how County Planning processes and reviews these projects (often called “referrals” once they are sent to County Planning), and what documents are used as guidance or as policy during County review.

I.1 Referral is Required by New York State

New York General Municipal Law (GML) requires that certain types of municipal planning, zoning and subdivision projects be referred to County Planning for review prior to local action being taken. The requirement seeks to promote coordination of land use decision-making and to enhance consideration of potential inter-municipal and county-wide impacts. This requirement is outlined in Article 12-b of the GML, §239 l, m and n. This process is commonly referred to across New York State as the “GML 239 referral”, the “GML 239 review”, or simply the “239 review” process.

There are three sections of GML §239 which govern this process: §239-1 describes the purpose for county review; §239-m describes planning, zoning and development review referral; §239-n describes the referral of subdivision applications.

I.2 Projects That Must Be Referred

General Municipal Law §239 m and n specify that the following classes of projects be referred to County Planning:

- adoption or amendment of a comprehensive plan pursuant to Section 72-a of Town Law, Section 7-722 of Village Law or Section 28-a of General City Law;
- adoption or amendment of a zoning ordinance or local law;
- issuance of special use permits;
- approval of site plans;
- approval of subdivisions¹;
- granting of use or area variances;
- other authorizations that a municipality may issue under the provisions of any *Zoning Law* or local law.

¹ According to §239-n the local board must refer applications for preliminary and/or final subdivision approval. Sketch plans are also referable if the local board votes to approve them. Even if sketch plans are not required to be referred, County Planning encourages the local Boards to refer sketch plan applications so that we may formulate and offer comments early in the review process.

The referral requirement for site-specific projects - such as special use permits, site plans, subdivisions, and variances - is geographically tied to certain features/facilities which raise the likelihood of potential intermunicipal or countywide impacts. A project should be referred if any portion of the parcel(s) that is part of the project is within 500 feet from any of the following features:

- a municipal boundary;
- a County or State road, existing or proposed;
- a County or State park or recreation area, existing or proposed;
- the boundary of any County or State-owned land on which a public building or institution is situated, existing or proposed;
- a farm operation located in one of the two updated Orange County Agricultural Districts (this one provision does not apply to area variances)
- the right-of-way of any stream or drainage channel owned by the county or for which the county has established channel lines, existing or proposed. *NOTE: Orange County does not own any streams or drainage channels, so this clause does not apply.*

Even if not strictly referable, County Planning review can aid municipalities by offering technical and planning expertise on any particular project that is before a local board.

See Figure I.1 “*Referral Phase Flowchart*” on the following page

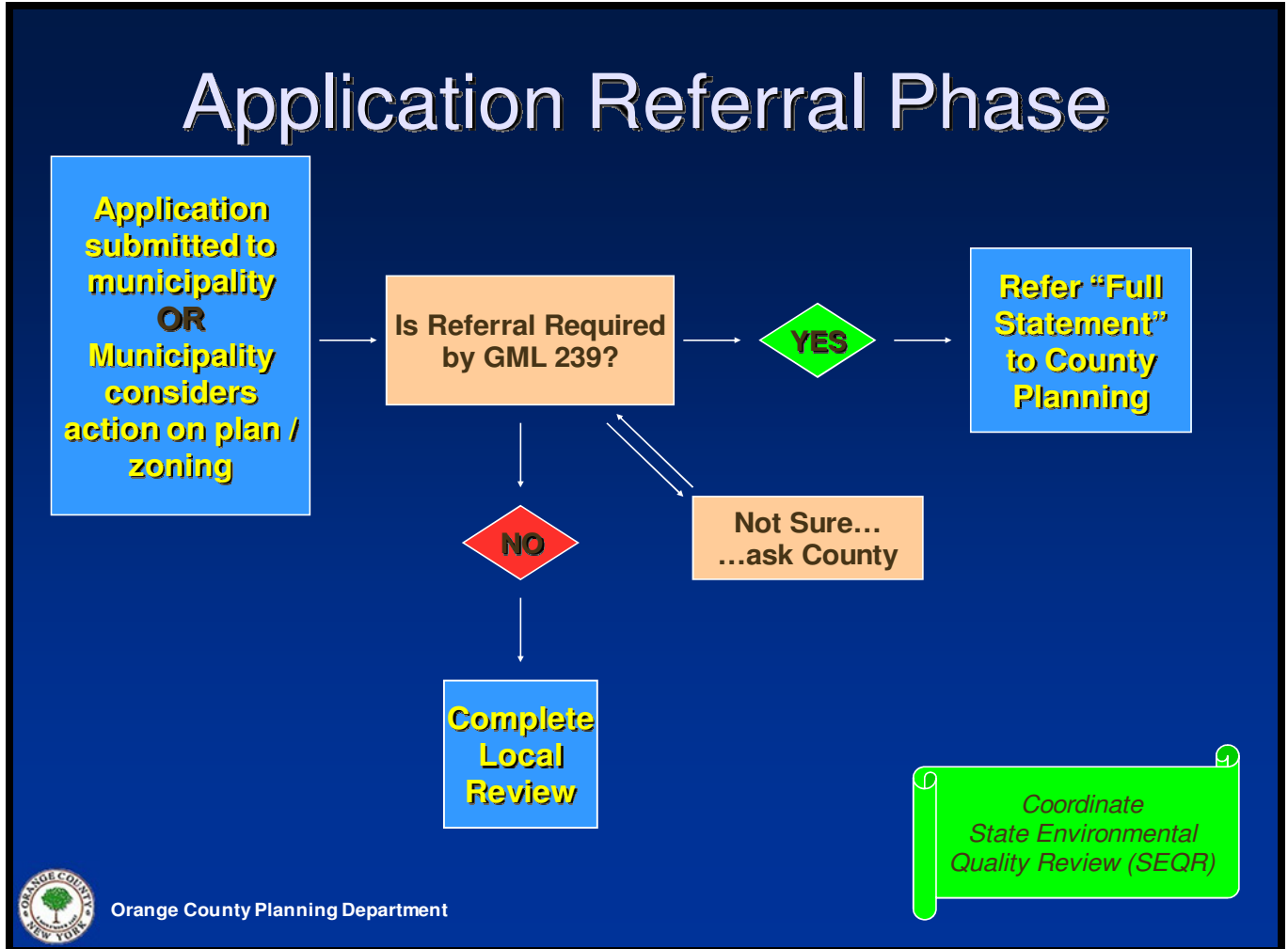


Figure I.1 “Referral Phase Flowchart”

I.3 What Materials Get Referred

The GML requires and County Planning expects that the referring local board will submit a full statement of the project as defined in §239 m and n. A **full statement** is defined in GML as:

all materials required by and submitted to the referring body as an application on a project, including a completed environmental assessment form and all other materials required by such referring body in order to make its determination of significance pursuant to the state environmental quality review act under article eight of the environmental conservation law and its implementing regulations. When the project referred is the adoption or amendment of a zoning ordinance or local law, "Full Statement of such Project" shall also include the complete text of the proposed ordinance or local law as well as all existing provisions to be affected thereby, if any, if not already in the possession of the county planning agency or regional planning council.

A full statement therefore typically includes the following items:

- all materials required by and submitted to the local board as an application;
- all materials required by and submitted to the local board in order to make its determination of significance under SEQRA, including Final Environmental Impact Statements;
- any additional materials agreed upon by the local boards and County Planning;
- for zoning amendments: the complete text of the revisions as well as all existing provisions to be amended, if any, if not already in the possession of the County Planning;
- for area and use variance appeals: an explanation that justifies the need for a variance, i.e. the applicant's written demonstration that they or the land in question [for a use appeal] meet the tests for the granting of a variance;
- a statement of the relationship between the project and the County Comprehensive Plan.

If County Planning discovers during review of the referral that any of the required information has not been provided and that, therefore, the referral does not constitute a full statement, County Planning will notify the local board so that the missing materials can be submitted. In some cases the municipality hasn't gotten the materials either and would then turn to the applicant or appellant to ask for the required information.

Please keep in mind that, even after the initial referral to County Planning, items that the local board receives that are part of the application being considered must be forwarded to the County.

In addition to the full statement, all referrals must include County Planning's **Cover Sheet**, which should be filled out by the municipality. This Sheet provides information to County Planning's staff that is essential to the processing of the referral. The Sheet can be found on County Planning's website, or in the Appendix of this *Guide*. The municipality should indicate the following information on the Cover Sheet:

- Name of Referring Municipality;
- Name of Referring Board;
- Name of Applicant;
- Name of Project;
- Location of Project Site;
- Reason for County Review;
- Tax Map Number;
- Local File Number;
- Size of Parcel;
- Current Zoning, including overlays; and
- Type of review being submitted.

I.4 Timing Considerations

County Planning is allowed the following timeframes to review and reply after receipt of a full statement:

- a *minimum* of thirty (30) days, and
- a *maximum* of up to two (2) days prior to a regularly scheduled meeting during which the board will be taking action (i.e. voting) on the project

The date of **receipt** of a full statement is the postmark date, if mailed, or the date of delivery, if hand-delivered.

Local boards must provide for this time period when scheduling votes on projects that are subject to referral to County Planning – the local board does not have jurisdiction to take action until the time standard outlined in GML §239 has been satisfied. Or, if no reply from County Planning has been received within the aforementioned time period, the local board may take action without County reply. Courts have held that acting without GML §239 jurisdiction is an administrative error, which nullifies the action of the local board.

See Chapter IV “*Legal Implications of the §239 Referral Process*” for additional pertinent information.

Consider the following scenarios:

- *A Town Planning Board refers the Full Statement of a proposed commercial site plan to the County Planning Department. The materials are postmarked March 1st (which is the date of “receipt”). The County Planning Department replies on April 10th that the site plan should be modified prior to receiving Town Planning Board approval. The Town Planning Board meeting is scheduled and held on April 17th. Though the County reply was made more than thirty days from the referral, its reply was received by the town more than two days in advance of the meeting. Therefore, the Town Planning Board would be required to adhere to the recommendation, or muster a supermajority to override, and state the rationale for overriding the County recommendation.*
Or...
- *A Town Planning Board hand-delivers a referral on March 1st, but does not get a reply from the County before its meeting on April 1st. The Board has satisfied the referral process and does not need to wait for a County reply prior to taking action on the matter that was referred.*

If County Planning determines more time is needed to review a referral, it may approach the local board and, if mutually agreeable, arrange for an extension of the review period. Municipalities should avoid requesting expedited reviews by County Planning, which will strive to be helpful and expeditious in its review letters but cannot guarantee that such requests are agreed to. Please allow at least the mandated thirty (30) days for County Planning review.

II. Purpose and Principles of County Review

The intended purpose of GML Sections §239 l, m and n is to bring pertinent inter-community and countywide matters into consideration in the review of planning, zoning, and development review applications.

Part of this process involves bringing projects to the attention of neighboring municipalities and agencies having jurisdiction. County Planning uses the referral process to ensure consistency with the policies of Orange County, notably represented in Orange County's *Comprehensive Plan* and its two Supplemental Chapters: 1) the *Open Space Plan* (2004) and 2) the *Water Master Plan* (2010). Additionally, the Long Range Transportation Plan and various other reports and studies are referred to when reviewing projects for consistency with County policies. These documents, discussed in the "Other Reference Documents" section of this *Guide*, are amended from time to time – the most recent version are available on-line at www.orangecountygov.com/planning or by calling the County Planning office.

While conducting reviews, County Planning will specifically consider the following items as defined in GML §239 l:

- Compatibility of various land uses with one another;
- traffic generation characteristics of various land uses in relation to the effect of such traffic on other land uses and to the adequacy of existing and proposed roadways;
- impact on existing and proposed County or State uses;
- protection of community character as it relates to predominant land uses, population density, and the relation between residential and nonresidential areas;
- drainage and watershed;
- community facilities;
- official municipal and County development policies, as may be expressed through comprehensive plans, capital programs or regulatory measures;
- such other matters as may relate to the public convenience, to governmental efficiency, and to the achieving and maintaining of a satisfactory community environment.

II.1 Orange County Comprehensive Plan Principles

Policy statements that provide a general vision for the future growth of Orange County are found within the 2003 *Orange County Comprehensive Plan* and its updates in 2004 and 2010. The *Comprehensive Plan* defines primary trends, assets, and challenges that Orange County and its partner municipalities share. Every five years, the County Commissioner of Planning, in consultation with the Orange County Executive and the Orange County Planning Board, must review and update the *Orange County Comprehensive Plan* and submit it to the County Legislature for approval. Consistent with GML §239(d), the *Orange County Comprehensive Plan* has two primary legal implications: (1) all county land acquisitions and public improvements must be in accordance with the *Plan* and (2) all plans for capital

projects of a Municipality, County or State governmental agency on land included in the *Orange County Comprehensive Plan* must take the *Plan* into consideration.

Below are the broad issues addressed in the *Orange County Comprehensive Plan* and are the key considerations taken into account by County Planning when conducting the review of a referred project:

- ***Declining Affordability:*** the need to find ways to insure greater access to livable wages, affordable housing, and available community services for all of our diverse population.
- ***Retaining and Attracting Our Youth:*** to insure the diversity and quality of our communities and our workforce in the future.
- ***Insuring A Lead Role for Our Central Places, Cities, Villages, and Hamlets:*** the vitality of these places is a prime indicator of successful planning.
- ***Better Managing Development Patterns:*** traffic congestion and increasing difficulty in finding adequate water supplies are some of the leading signs that land development location, pace, and design need improved management.
- ***The Future of Agriculture:*** the need for direct efforts to help reduce the costs and provide incentives to help overcome market forces that encourage the conversion of farms to residential and commercial development
- ***Protection of Water Resources:*** reservoirs and lakes, streams, wetlands aquifer recharge areas, and public water supplies are vital resources that provide essential services to the County residents, businesses, and ecosystems
- ***Conservation of open space and natural resources:*** development should be balanced with the conservation and protection of the County’s biological gems, scenic vistas, historical sites, and recreational assets

II.2 The County’s Priority Growth Areas (2010)

Orange County developed Priority Growth Areas (“PGA’s”) in order to provide a countywide, regional perspective for County leaders, local municipal officials, and all citizens involved in land use decisions. First introduced in the 2003 *Orange County Comprehensive Plan*, the PGA’s concept was reworked and redefined in the 2010 update to the *Orange County Comprehensive Plan*. The PGA’s were reassessed with respect to centralized water and sewer service areas, land use, local zoning districts, certain environmental constraints and protected open space. The original elements, which included six settlement categories in the 2003 *Orange County Comprehensive Plan*, were redefined into just two categories: Local Centers and Transit Opportunities.

See Figure II.1 “*Priority Growth Areas*” on the following page.

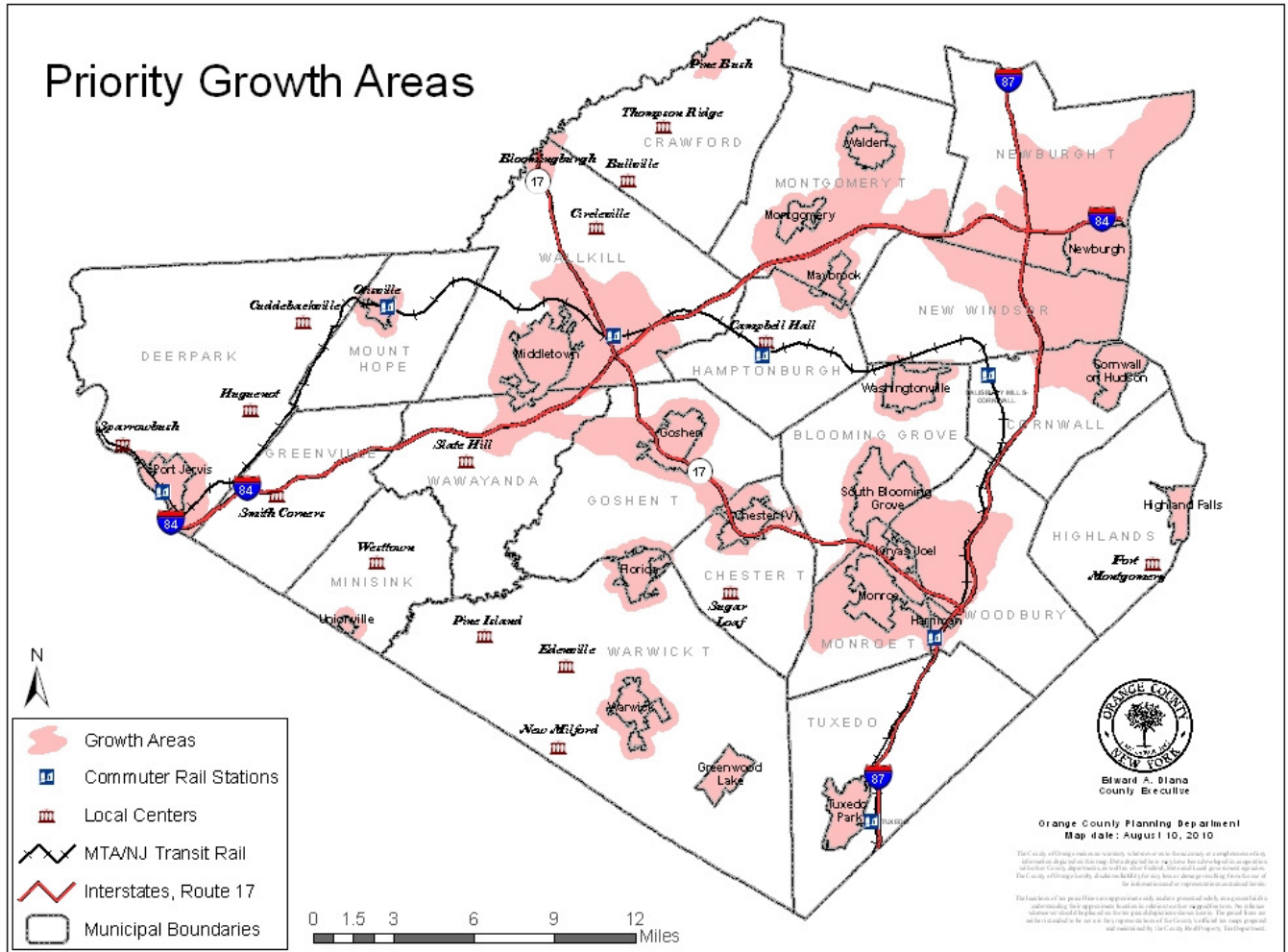


Figure II.1 “Priority Growth Areas”

- **Growth Areas:** Growth Areas include the historic cities and villages of the County where growth has historically occurred, with some outlying areas for logical projected growth. The Growth Areas identified are particularly significant in a region with a largely rural history and character because they provide a sense of place and a focus of services amid larger areas of open space, agriculture, forest lands and rural residential neighborhoods. Most include a prominent central business district, the presence of regional civic and employment sites, a mix of land use types and intensities, pedestrian oriented neighborhoods, access to major transportation systems, and a diversity of housing, community and commercial activities. It is within the boundaries of the Growth Areas that Orange County encourages additional urban/village growth, such as higher density residential, commercial and certain industrial uses, as well as other community services. The use of infill construction as a method of revitalization is especially appropriate within the Growth Areas. Priority should be given to the Growth Areas, and specifically the Villages and Cities within them, for County support, incentives, and investment in water and sewer infrastructure improvements/extensions, sidewalk construction, transportation infrastructure, opportunities for transit-oriented development, housing, and commercial development.

- *Transit Opportunities:* Additional focus for growth within the Growth Areas should be given to areas of existing transit service. Priority consideration should be given to increasing options for travelers seeking intermodal connections between transit, motor vehicle, and pedestrian or bicycle transportation. The County strongly endorses the transit-oriented development concept that offers pedestrian-scaled projects and an appropriate mix of residential and commercial development at densities and scales sited to take advantage of transit connections.
- *Local Centers:* Another component of the refined PGA’s concept is the Local Center, which includes many of the County’s more established hamlets, some of which may provide limited services to surrounding residents. They typically include community or civic facilities and modest retail or professional services. Centralized public services are not currently common in these centers, but may be needed to accommodate added growth. Local centers also include some crossroads and major road intersections that serve or could serve as future community or neighborhood centers but are not reliant on immediate arterial or interstate highway access. County investment in these locations should be focused on addressing preexisting water and sewer infrastructure needs, improving transit and transportation, the enhancement of amenities, such as parks, trail development and tourist attractions and small business development.
- *Areas Outside Priority Growth Areas:* As described under “The Priority Growth Concept” section, the Orange County *Comprehensive Plan* PGA’s concept is fundamentally based on a differentiation between urban and rural areas. While Orange County’s goals for the urban areas are described above, following is a description of the County’s objectives for the rural areas outside of the PGAs. The County’s highest priority for rural areas is the protection of open space, which includes both working landscapes and natural resources. The many values of open space are outlined in Orange County’s *Open Space Plan*, described under said heading later in this *Guide*.

II.3 The Water Master Plan (2010)

This document is a Supplemental Chapter to the *Orange County Comprehensive Plan* and is meant to clarify and enable ways that County government can smartly and effectively function in the future to assure the availability of water in the County. This Plan assumes that success for such function must be based on collaboration between municipalities, water purveyors, and the County including the Orange County Water Authority (“OCWA”). This Amendment also addresses core issues of concern and recommended actions from the 2003 County Comprehensive Plan, notably towards “defining ... water carrying capacities” and “to foster cooperation with municipalities including inter-connections among local systems where possible.”

The *Water Master Plan* focuses on the overall evaluation of future demand for water within the Orange County and the formulation of initiatives to address these demands. The *Water Master Plan* also addresses the essential need for source water protection, research and monitoring, conservation and the promotion of water policies that encourage the efficient use of energy.

II.4 Orange County Open Space Plan (2004)

This document is a Supplemental Chapter to the *Orange County Comprehensive Plan* and identifies priority natural resource areas that are worthy of conservation. *The Orange Space Plan* also identifies techniques that can be utilized in order to provide for and protect open space. Natural resource areas of consideration are divided into five categories in the Plan:

- water resources
- agriculture
- recreation
- landforms and landscapes
- biological diversity.

Protection of the specific resource areas identified in the *Open Space Plan* is a high priority recommendation to the municipalities in Orange County. The inventory and prioritization of resource areas in the *Plan* are also used by local and regional conservation partners for planning and protection efforts.

II.5 Other Policy and Reference Documents

While the *Orange County Comprehensive Plan* and its Supplemental Chapters are County Planning's primary policy documents, there are many other plans and documents that the County uses as **guidance documents** – these are often quoted or referred to by County Planning in their GML 239 letters to the municipalities. Most of these documents can be found on County Planning's or the OCWA's websites and include, but are not limited to, the following:

- *Orange County Transportation Council Long Range Transportation Plan (2007)*: The Orange County Transportation Council carries out planning functions related to transportation matters in Orange County, including developing a Unified Planning Work Program every year, the Transportation Improvement Program every two years, and the Long Range Transportation Plan every four years. This planning is carried out by the Orange County Transportation Council, which is an inter-agency and inter-municipal body established by New York State and the Federal Government. OCTC is chaired by the County Executive and is staffed by County Planning.
- *Regional Housing Needs Assessment (2009)*: the Counties of Dutchess, Orange and Ulster initiated a Regional Housing Needs Assessment to determine whether the housing needs of the existing residents of the three (3) counties were being met; the final report found that Orange County in particular lacks housing that is affordable for much of its population.
- *Agricultural Economic Development Strategy (2004)*: Although not adopted by the Legislature, the County's Agriculture and Farmland Preservation Board has used this *Strategy* to inform discussions, decisions and processes.

- *Agricultural and Farmland Protection Plan* (1996): The document outlines recommendation that should be utilized in an effort to encourage and build the County’s vital agriculture industry and preserve irreplaceable farmland.
- *Orange County Design Guide* (2010): In addition to assisting County Planning in the GML 239 review process, the *Design Guide* has been widely distributed among the municipalities in Orange County and continues to be marketed as an essential reference for local boards. Overall, the *Guide* serves as a manual towards smart growth goals and objectives by providing a series of visual examples that are organized into three themes: Green Infrastructure, Connectivity, and Complete Communities. The *Guide* also provides policy recommendations, tools and implementation strategies that can further those goals.
- *Non-motorized Transportation Plan* (1998): The Orange County Transportation Council developed Orange County’s first Bicycle and Pedestrian Plan as an outgrowth of the Long Range Transportation Plan. The *Non-motorized Transportation Plan* inventories existing facilities and recommends future actions to promote bicycling and walking as viable travel alternatives. The *Plan* provides a vision statement supported by goals and objectives, and performance measures were identified to gauge the effectiveness of the objectives. The *Plan* is scheduled to be updated in 2012.
- *Southeastern Orange County Transportation and Land Use Plan* (2003): This document is a collaborative assessment and planning study largely resulting from increased population growth, land development, and traffic issues in the Southeast Part of Orange County. The *Southeastern Orange County Transportation and Land Use Plan* encompasses the following municipalities:
 - Blooming Grove (T)
 - Washingtonville (V)
 - Harriman (V)
 - Woodbury (T & V)
 - South Blooming Grove (V)
 - Monroe (T & V)
 - Kiryas Joel (V)
- *Newburgh Transportation and Land Use Study* (2011): The document is an area-focused analysis that examines the past, present and future implications of transportation planning throughout the Newburgh Area, with a heightened emphasis on non-motorized (e.g. bicycle & pedestrian) planning. The *Newburgh Transportation and Land Use Study* encompasses the following municipalities:
 - Cornwall (T)
 - Montgomery (T & V)
 - Walden (V)
 - Newburgh (C)
 - Cornwall-on-Hudson (V)
 - Maybrook (V) Walden (V)
 - New Windsor (T)
 - Newburgh (T)
- *Mid-County Study* (ongoing): OCWA is conducting a planning study of the central portion of the County, focusing on development trends, smart growth planning alternatives, and water resource evaluation and management. The *Mid-County Study* encompasses the following municipalities:

- Crawford (T)
 - Wallkill (T)
 - Wawayanda (T)
 - Goshen (T & V)
 - Middletown (C)
- *Moodna Creek Watershed Conservation & Management Plan* (2010): OCWA worked collaboratively with many partners to create a watershed plan that inventories and addresses watershed issues related flooding, stormwater management, biodiversity, water quality, development intensity, public access to water, and other important topics. The Moodna Creek Watershed includes at least portions of the following municipalities:
- Blooming Grove (T)
 - Washingtonville (V)
 - Cornwall (T)
 - Hamptonburgh (T)
 - Montgomery (T)
 - Warwick (T)
 - South Blooming Grove (V)
 - Chester (T & V)
 - Goshen(T)
 - Monroe (T)
 - New Windsor (T)
 - Woodbury (T & V)
- *Wallkill River Watershed Conservation & Management Plan* (2006): This document identifies and prioritizes various management needs throughout the Wallkill River watershed, and provides guidance and a list of projects and actions that can be implemented to protect and improve the watershed. The Wallkill River Watershed includes at least portions of the following municipalities:
- Chester (T)
 - Goshen (T & V)
 - Hamptonburgh (T)
 - Unionville (V)
 - Maybrook (V)
 - Mount Hope (T)
 - New Windsor (T)
 - Wallkill (T)
 - Warwick (T & V)
 - Wawayanda (T)
 - Crawford (T)
 - Greenville (T)
 - Minisink (T)
 - Montgomery (T & V)
 - Walden (V)
 - Otisville (V)
 - Newburgh (T)
 - Middletown (C)
 - Florida (V)
- *Orange County Water Authority's Stream Biomonitoring Reports* (2004 through 2010): The OCWA's stream biomonitoring program has given rise to an abundance of water quality data for Orange County's streams. This information is used to assess the overall health of streams countywide and to be the foundation of future exploratory work into causes of water quality impairments.

III. County Planning Review Process

County Planning accepts hundreds of referrals each year. The flow chart below outlines the process that occurs once a referral arrives in County Planning's office.

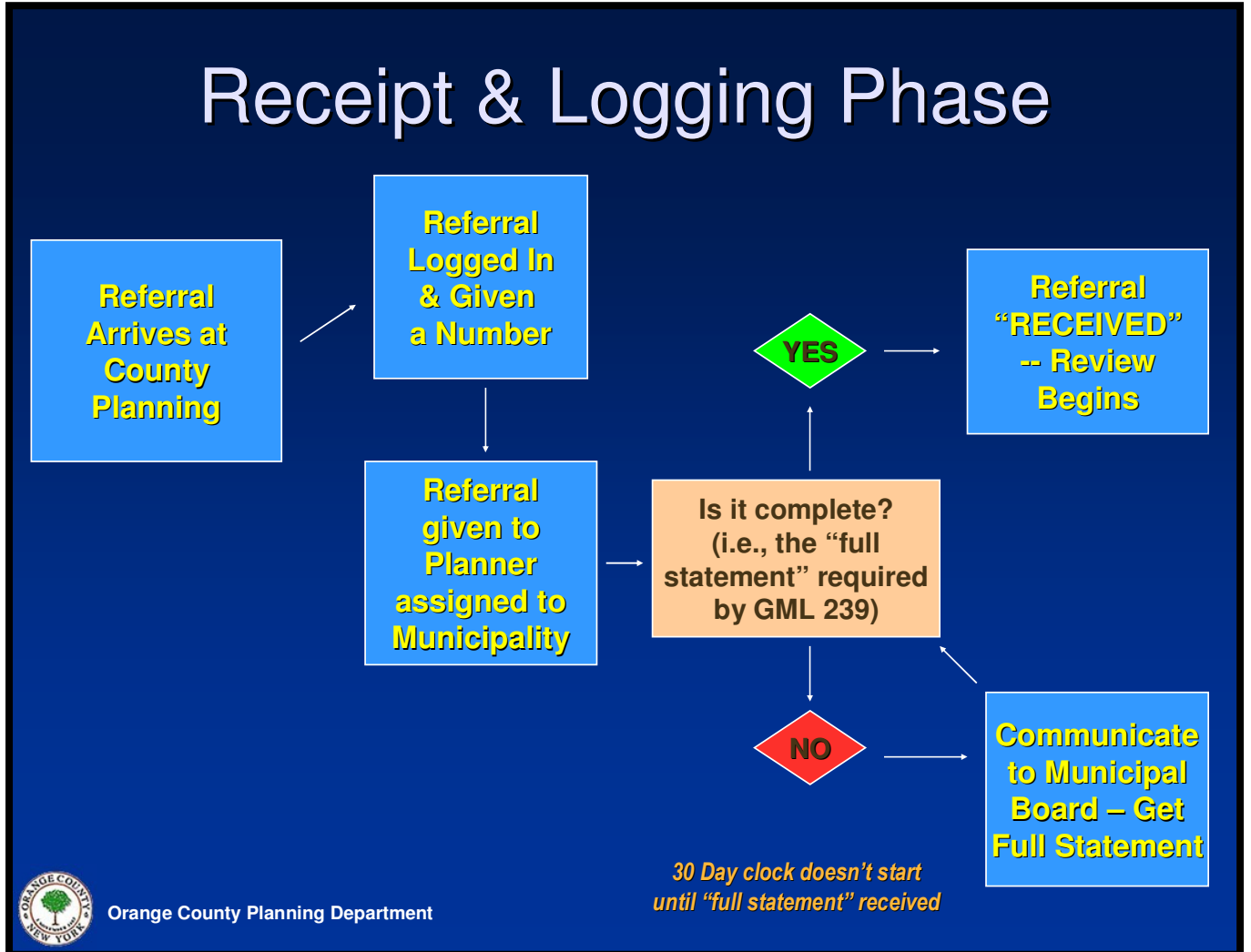


Figure III.1 "Receipt and Logging Phase Flowchart"

While it is necessary to be explicit and clear about how the process works, the intent of County Planning's role is to provide helpful solutions to improve proposed plans and local laws and to give professional review of proposed development activities in order to assist the local municipality in making their decision. In so doing, Orange County hopes to advance the policies of adopted County plans, as well as protect the interests of Orange County. This process also enables County Planning to track and coordinate actions across municipal borders.

III.1 County Planning Staff Assignment and Review

Referrals are assigned to a certain planner based on municipality; each municipality is assigned to a specific planner. That planner is the lead contact person for all referrals from a set of municipalities. See Figure III-2 “Municipal Planning Assignments” for the map of current assignments.

Referrals are researched and reviewed by the assigned planner. As necessary, planners work with other county staff and with municipal or local contacts and experts to complete reviews. County Planning also coordinates with Orange County Departments of Public Works and/or Environmental Health, if relevant. Most reviews are read and signed by the Commissioner or Deputy Commissioner of Planning, although area variances are typically signed by one of two Senior Planners.

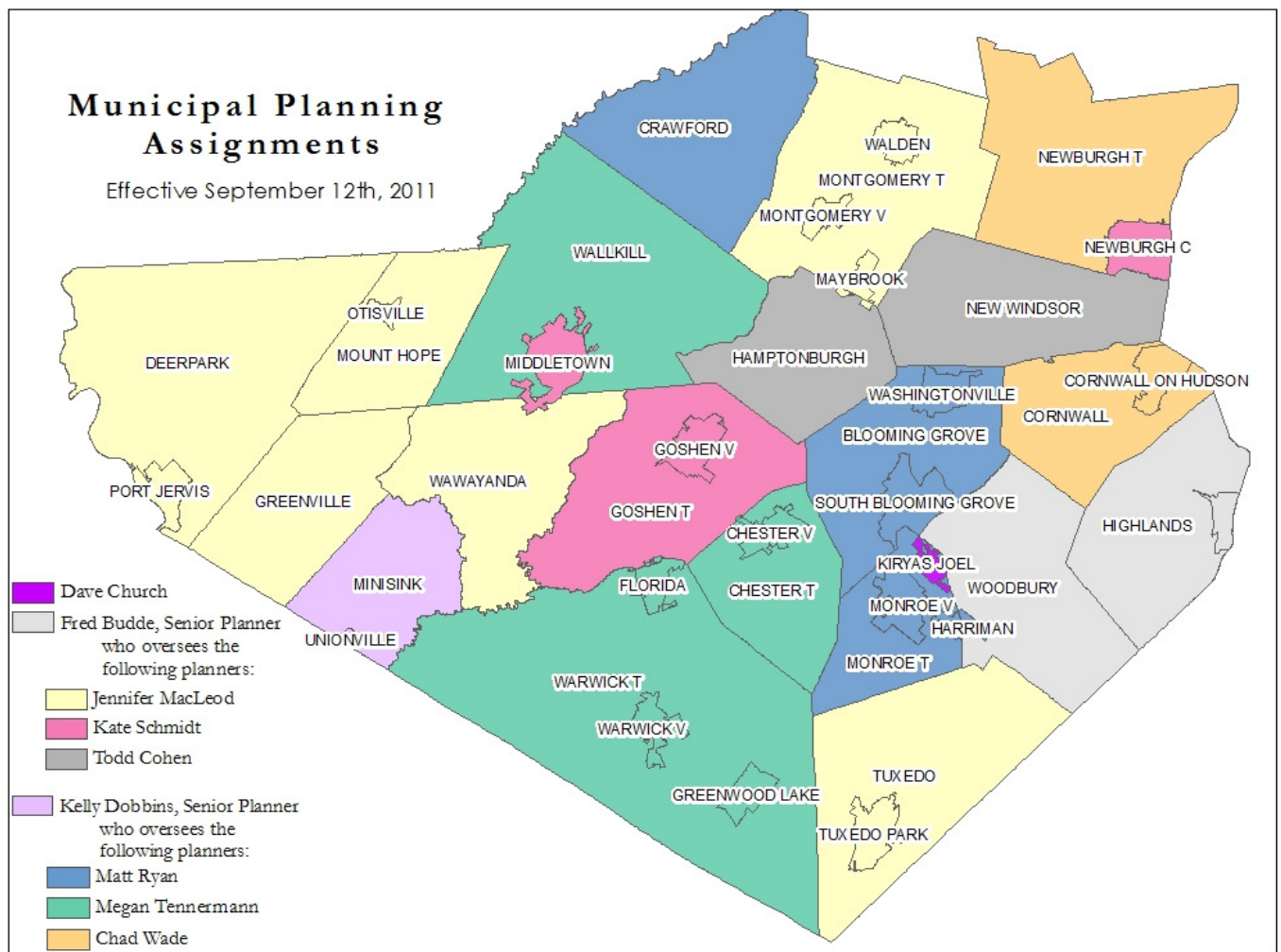


Figure III.2 Municipal Planning Assignments as of September 12, 2011”

III.2 Review Letter Recommendations

County Planning’s review letters can include advisory comments, which are meant to provide helpful insights or suggestions, as well as binding recommendations, which are discussed below. An important distinction to make is that County Planning does not have actual decision-making or permitting authority for items referred for review under GML §239 l, m and n; the land use approval process in New York State is overseen by local boards, which have jurisdiction for nearly all procedural matters, including environmental review and public hearings. Therefore the strongest hand that County Planning can have is a binding recommendation.

Binding recommendations are those that either require adherence by the local board **or**, if the local board feels strongly that the recommendation should not be adhered to, a supermajority vote (i.e. a simple majority plus one) to override County Planning’s recommendation. In doing so, the local board must state - in the findings of its decision and in writing to County Planning - the rationale for taking that contrary action. The method of informing County Planning is by filling out and sending the Report of Final Local Action form, which can be found on County Planning’s website or in the Appendix of this *Guide*.

County Planning can render one (1) of four (4) recommendations identified below:

1. *Approval*: County Planning finds that the project will not create any major inter-municipal and county-wide impact(s) to the items identified in GML §239 and is in general conformity with County Policy. A recommendation for approval is not binding on the municipality; no supermajority is needed to disapprove a project for which approval has been recommended.
2. *Modification, also known as “Approval with Conditions”*: County Planning agrees that the project should proceed if the conditions outlined in the review letter are met. Binding recommendations to modify a project require a supermajority vote to take contrary action.
3. *Disapproval*: The project is in stark contrast to established County policy and/or may have major inter-municipal and county-wide impact(s) on one or more of the items identified in GML §239(l). Any binding recommendations require supermajority to take contrary action.
4. *Local Determination*: County Planning may find that the matter is primarily of local concern when there are no significant county-wide or inter-community impact(s) and thus believes that the local board should come to a decision based on its findings alone. County Planning may attach advisory comments for the local board to consider during its deliberations.

The local board is required to send County Planning a record of its decision within thirty (30) days of taking final action. In addition the Report of Final Local Action form, the local board must provide findings for that contrary decision. Failure to comply with this policy - and indeed any policy stated in GML §239 l, m and n - could place the local board and the project in legal jeopardy.

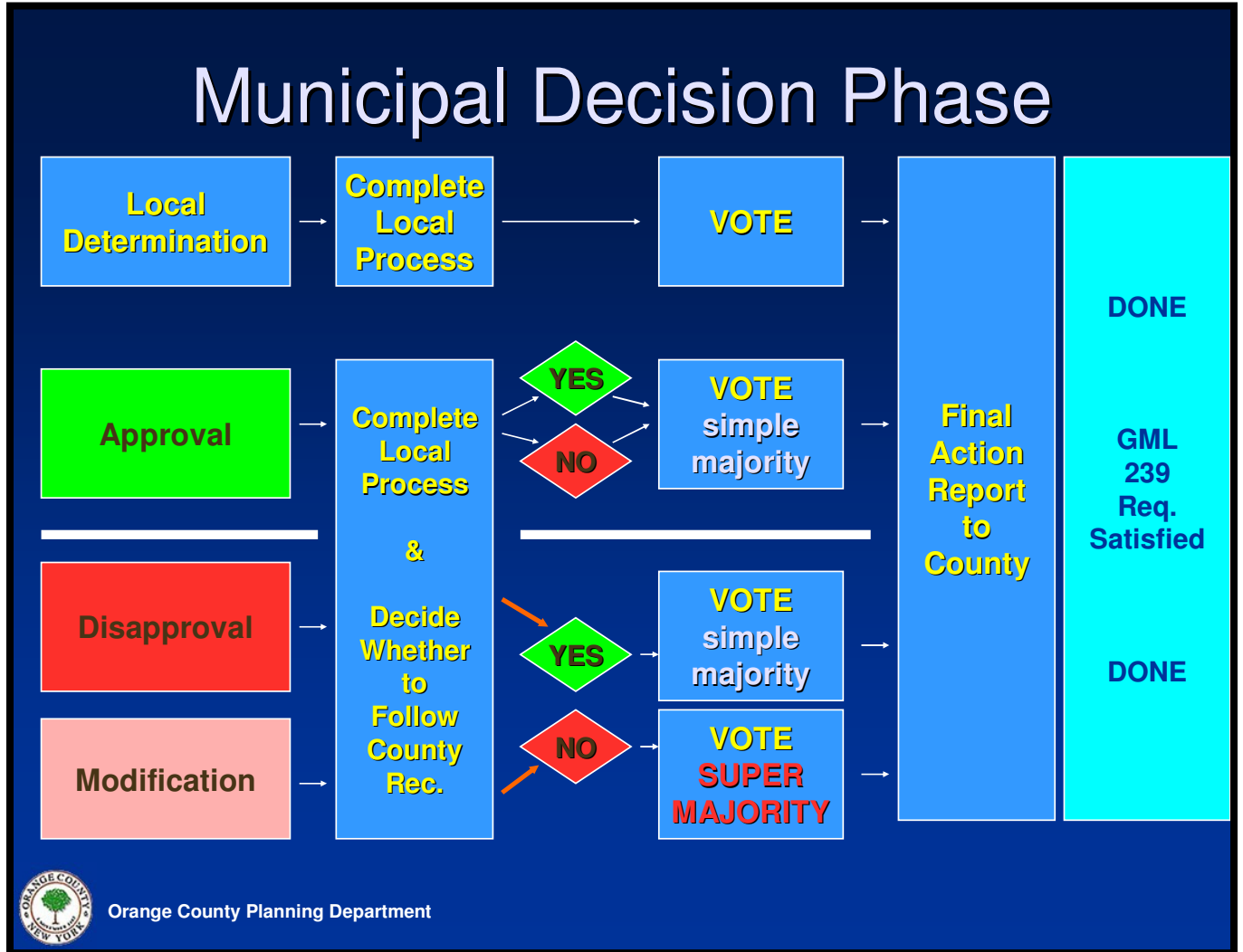


Figure III.3 “Municipal Decision Phase Flowchart”

III.3 Meeting with County Planning

County Planning is available for a variety of assistance requests, and will meet with municipal officials, property owners, interested parties and municipal applicants as needed. County Planning is also available to attend municipal board meetings at the request of the local board.

If an applicant for a project that is subject to GML §239 review requests a meeting with a representative from County Planning, the County will typically oblige, although a representative from the municipality will be also invited to attend since County Planning’s obligations are to municipalities and not to applicants.

IV. Legal Implications of the 239 Referral Process

Courts have repeatedly determined that municipal decisions or ordinances are null and void if the decision or ordinance concerns matters described in GML 239-l, m or n, and the municipality did not first refer the matter to the regional or county planning agency. Below is a listing of recent cases in which New York State Courts within Orange County’s jurisdiction have reached this conclusion.

While the County does not have enforcement power against municipalities that do not comply with GML 239, there may be cases where it is appropriate to bring a legal action against a municipality for failing to refer a project that is subject to referral under GML §239, if the County has sufficient proof that the project that was not referred will damage County property or County interests.

IV.1 Applicable Cases

John F. Seyferth, Karen D. Ungerer and Donald Siebold v. Town Board of the Town of Woodbury et.al., Supreme Court of the State of New York, Orange County Indes # 8723/05, Motion Date 3/6/06. This CPLR Article 78 proceeding concerned the petitioners seeking judgment to annul five (5) zoning amendments and corresponding SEQRA findings by the Town of Woodbury in approving the Woodbury Suburban Project, also known as WP3.

Petitioners are resident property owners who challenged the Town of Woodbury actions as: (1) in violation of provisions of GML 239-m, (2) as inconsistent with the Town’s 1988 *Master Plan* and 2005 *Comprehensive Plan* update, and (3) in violation of certain SEQRA regulations (6 NYCRR 617).

Most relevant to this *Guide*, is the decision on item (1) above by the Acting Supreme Court Justice, Honorable Elaine Slobod. Here the Court ruled that the referral to the County Planning Commissioner of the required “Full Statement of such Project” under GML 239-m(1)(c) must include not just a DEIS but also the FEIS. A review of this case also helps to clarify what should be referred to County Planning in meeting the statute definition of “Full Statement” and “all materials required by and submitted to the referring body”, as well as the timing of such referral in triggering the statutory thirty (30) day time period for County Planning to make recommendations.

In re the Matter of Gernatt Asphalt Products, Inc. v. Town of Sardinia, et al., 664 N.E.2d 1226, 642 N.Y.S.2d 164 (1996). This was issued by the Court of Appeals, New York State’s highest court of law and thus is binding in all New York State jurisdictions.

The owner of a mining operation challenged the municipality’s adoption of two ordinances which repealed sections of law that designated quarries, clay, sand and gravel pits as “permitted uses” in the R-A district. Before adopting these ordinances, the Town referred the proposed amendments, as well as a third proposed ordinance which would have made quarries a “specially permitted use”, to the Erie County Department of Environment and Planning under GML 239-l, which responded with “no recommendation.”

The Petitioner argued that the matter should have been re-referred, because the Town initially referred three ordinances and then only adopted two, resulting in the prohibition of quarries and mining operations except as “nonconforming uses”, and that the Planning Department may have made a different recommendation if it knew only two were to be adopted.

The Court determined that the Planning Department was sufficiently notified of the proposed ordinances and a re-referral was not necessary, particularly since the Planning Board knew the Board’s intent was to limit mining operations, and the non-adoption of the third ordinance only changed the legal status of existing mining operations and “was of little relevance to traffic, population density, community appearance and facilities, and other matters within the domain and concern of the Planning Boards.”

Roanoke Sand & Gravel Corp. v. Town of Brookhaven, 24 A.D.3d 783 (2d Dept. 2005) Appellate decision binding in Orange County. A Property owner submitted an application to the Town for approval to construct an asphalt plant. While the application was pending, the Town Board enacted a moratorium on development, based on the pending review of the Town’s comprehensive plan and zoning laws. The property owner then brought suit, challenging the moratorium. The Court held that if the Town Board failed to refer the moratorium to the Suffolk County Planning Commission before enacting it, then the moratorium would be null and void.

Lamar Advertising of Penn LLC v. Village of Marathon, 24 A.D.3d 1011, 805 N.Y.S.2d 495 (3rd Dept. 2005). Appellate decision, not binding in Orange County. Owners of a billboard were denied a variance by the ZBA for a 60-foot billboard, where the zoning law limited billboards to 25 feet. The Owners sued, arguing that the ZBA decision was invalid in that it failed to refer the matter to the County Planning agency. The Court annulled the ZBA decision, writing that “failure to comply with this provision ‘is not a mere procedural irregularity, but rather ... a jurisdictional defect involving the validity of a legislative act.’”

Matter of Eastport Alliance v. Jackie Lofaro, 13 A.D.3d 527, 787 N.Y.S.2d 346 (2d Dept. 2004) Appellate decision binding in Orange County. A civic association and local residents challenged the site plan approvals provided to a developer of a catering hall by the Planning Board, arguing that the Planning Board failed to refer the projects to the Suffolk County Planning Commission before approving the site plans.

The Court held that the Administrative Code of the County of Suffolk, as well as GML 239-m, required the Planning Board to refer land use applications to the Planning Commission. Since the referral was never made, the Planning Board had no jurisdiction to approve the project and its approval was null and void.

Ernalex Const. Realty Corp. V. City of Glen Cove, 256 A.D.2d 336, 681 N.Y.S.2d 296 (2d Dept. 1998). The Court held that the City’s failure to refer municipal zoning ordinance to County Planning Agency was jurisdictional rendering the ordinance invalid.

In the Matter of Burchetta v. Town Board of the Town of Carmel, 167 A.D.2d 339, 561 N.Y.S.2d 305 (2d Dept. 1990) This is an Appellate decision, binding in Orange County.

Landowners challenged a Local Law which increased requirements for subdivision applications, including requiring the submission of an “environmental constraints map” with all applications for site plan approval, residential cluster development and subdivision of land, and tightened the definition of what constitutes “developable land.” The Law had not been referred to the County Planning Commission. The Court invalidated the law, finding that it was null and void because the Town Board had no jurisdiction to enact it without making a referral to the Planning Commission.

Appendix A: Forms

Cover Sheet

Report of Final Action



Edward A. Diawo
County Executive

Orange County Department of Planning

Submittal Form for Mandatory Review of Local Planning Action as per NYS General Municipal Law §239-l,m, & n

Referral ID#:
(County use only)

This form is to be completed by the local board having jurisdiction. Submittals from applicants will not be accepted unless coordinated with both the local board having jurisdiction and the County Department of Planning.

Please include all materials that are part of a "full statement" as defined by NYS GML §239-m (i.e. "all materials required by and submitted to the referring body as an application on a proposed action").

Municipality:

Local Referring Board:

Applicant:

Project Name:

Location of Project Site:

Tax Map #:

Tax Map #:

Tax Map #:

Local File No.:

Size of Parcel*:

*if more than one parcel, please include sum of all parcels.

Reason for County Review:

Current Zoning District (include any overlays):

Type of Review:

- Comprehensive Plan Update/Adoption
- Zoning Amendment
 - Zoning District Change from _____ to _____
 - Ordinance Modification (cite section): _____
- Local Law _____
- Site Plan Sq. feet proposed (non-residential only): _____
Which approval is the applicant currently seeking? SKETCH / PRELIM / FINAL (circle one)
- Subdivision Number of lots proposed: _____
Which approval is the applicant currently seeking? SKETCH / PRELIM / FINAL (circle one)
- Special Use Permit _____
- Lot Line Change _____
- Variance AREA / USE (circle one) _____
- Other _____

Is this an update to a previously submitted referral? YES / NO (circle one)

Local board comments or elaboration:

Signature of local official

Date

Title

Municipal Contact Phone Number: _____

If you would like the applicant to be cc'd on this letter, please provide the applicant's address:

Please return, along with full statement, to: Orange County Dept. of Planning 124 Main St. Goshen, NY 10924
Question or comments, call: 845-815-3840 or email: planning@orangecountygov.com



ORANGE COUNTY DEPARTMENT OF PLANNING

DAVID CHURCH, AICP
COMMISSIONER

124 MAIN STREET
GOSHEN, NEW YORK 10924-2124
TEL: (845) 615-3840
FAX: (845) 291-2533

www.orangecountygov.com/planning
planning@orangecountygov.com

**Report of Final Action by Local Board
as per NYS General Municipal Law §239-1, m, &n**

As stated in Section 239 of the General Municipal Law of the State of New York State, within thirty days of taking final action in regard to a required referral to the Orange County Planning Department, the local referring agency shall file a report as to the final action taken.

Local Board: _____ County Referral ID #: _____

Project Name: _____

Date of Local Action: ____/____/____ #Ayes: _____ #Nays: _____

In regard to the proposed action described above, the following final action was taken (*check one*):

_____ Our local board approved this action.

_____ Our local board approved this action with modifications. *Briefly describe the modifications below.*

_____ Our local board disapproved this action.

Reasons for acting contrary to County Planning Department's recommendation(s), if applicable:

