

MEMORANDUM OF LAW

To: Frank Chinnici  
From: John Garas  
Date: August 22, 2019  
Re: Cluster Development Law

I am advised that a number of years ago, the Town of Aurora approved your property for a total of 47 dwelling units, consisting of a mix of single, stand-alone buildings and buildings consisting of two side-by-side dwelling units.

I am also advised that subsequent to the original approval, the mix of singles and doubles was changed and that the approved plan was reduced from 47 to 46 units.

Finally, I am advised that you are in the process of requesting approval from the Town for the construction of a double and a single, which would bring the total number of dwelling units back to 47.

You have asked my opinion as to whether the Town has the authority to grant your request to permit the construction of a 47<sup>th</sup> dwelling unit on the property.

My opinion is that the Town clearly has authority to grant your request for a 47<sup>th</sup> dwelling unit pursuant to Town Law Section 278.

The purpose of a cluster development "shall be to enable and encourage flexibility of design and development of land in such manner as to preserve the natural and scenic qualities of open lands (Town Law Section 278(2)(b)).

This purpose is accomplished in two steps. Pursuant to Town Law Section 278(3)(b) a municipality must first determine the number of "building lots or dwelling units ... which would be permitted, in the planning board's judgment, if the land were subdivided into lots conforming to the minimum lot size and density requirements of the ordinance or local law applicable to the district or districts in which such land is situated and conforming to all other applicable requirements." This is commonly referred to an "as of right" development plan.

In this case the Town determined initially that a total of 47 dwelling units were permitted under the applicable ordinance.

Since the very purpose of the cluster statute is to "enable and encourage flexibility of design and development of land" Town Law Section 278 (d) affords the planning broad discretion to adjust the mix of housing in a residential development: "[i]n the case of a residential plat

or plats, the dwelling units permitted may be, at the discretion of the planning board, in detached, semi-detached, attached or multi-story structures”.

In the instant case, Section 278(d) can only be construed to give the planning board authority to adjust the mix of singles and doubles provided the maximum number of dwelling units does not exceed the “as of right” maximum number of 47 dwelling units. To limit the total number of dwelling units to less than the “as of right” number of 47 is to tie the planning board’s hands under Town Law Section 278 (d) to exercise its discretion to determine whether the as of right number is achieved by “detached, semi-detached, attached or multi-story structures”.

It therefore follows that in the instant case, the planning board has the power, in its discretion, to authorize the construction of the 47<sup>th</sup> dwelling unit.

I attach a copy of Town Law Section 278 for your reference.

[The Laws Of New York \(/LEGISLATION/LAWS/ALL\) / Consolidated Laws \(/LEGISLATION/LAWS/CONSOLIDATED\) / Town \(/LEGISLATION/LAWS/TWN\) / Article 16: Zoning And Planning \(/LEGISLATION/LAWS/TWN/A16\) /](#)

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## Section 278

Subdivision review; approval of cluster development

Town (TWN)

1. Definitions. As used in this section:

(a) "cluster development" shall mean a subdivision plat or plats, approved pursuant to this article, in which the applicable zoning ordinance or local law is modified to provide an alternative permitted method for the layout, configuration and design of lots, buildings and structures, roads, utility lines and other infrastructure, parks, and landscaping in order to preserve the natural and scenic qualities of open lands.

(b) "zoning districts" shall mean districts provided for in section two hundred sixty-two of this article.

2. Authorization; purpose.

(a) The town board may, by local law or ordinance, authorize the planning board to approve a cluster development simultaneously with the approval of a plat or plats pursuant to this article. Approval of a cluster development shall be subject to the conditions set forth in this section and in such local law or ordinance. Such local law or ordinance shall also specify the zoning districts outside the limits of any incorporated village in which cluster development may be applicable.

(b) The purpose of a cluster development shall be 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.

### 3. Conditions.

(a) This procedure may be followed at the discretion of the planning board if, in said board's judgment, its application would benefit the town. Provided, however, that in granting such authorization to the planning board, the town board may also authorize the planning board to require the owner to submit an application for cluster development subject to criteria contained in the local law or ordinance authorizing cluster development.

(b) A cluster development shall result in a permitted number of building lots or dwelling units which shall in no case exceed the number which could be permitted, in the planning board's judgment, if the land were subdivided into lots conforming to the minimum lot size and density requirements of the zoning

ordinance or local law applicable to the district or districts in which such land is situated and conforming to all other applicable requirements. Provided, however, that where the plat falls within two or more contiguous districts, the planning board may approve a cluster development representing the cumulative density as derived from the summing of all units allowed in all such districts, and may authorize actual construction to take place in all or any portion of one or more of such districts.

(c) The planning board as a condition of plat approval may establish such conditions on the ownership, use, and maintenance of such open lands shown on the plat as it deems necessary to assure the preservation of the natural and scenic qualities of such open lands. The town board may require that such conditions shall be approved by the town board before the plat may be approved for filing.

(d) The plat showing such cluster development may include areas within which structures may be located, the height and spacing of buildings, open spaces and their landscaping, off-street open and enclosed parking spaces, streets, driveways and any other features required by the planning board. In the case of a residential plat or plats, the dwelling units permitted may be, at the discretion of the planning board, in detached, semi-detached, attached, or multi-story structures.

4. Notice and public hearing. The proposed cluster development shall be subject to review at a public hearing or hearings held pursuant to section two hundred seventy-six of

this article for the approval of plats.

5. Filing of plat. On the filing of the plat in the office of the county clerk or register, a copy shall be filed with the town clerk, who shall make appropriate notations and references thereto on the town zoning map required to be maintained pursuant to section two hundred sixty-four of this article.

6. Effect. The provisions of this section shall not be deemed to authorize a change in the permissible use of such lands as provided in the zoning ordinance or local law applicable to such lands.

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The following is a chronological listing of legislation of the Town of Aurora adopted since January 1, 2003, indicating its inclusion in the Code or the reason for its exclusion. [Enabling legislation which is not general and permanent in nature is considered to be non-Code material (NCM).] Consult municipal records for disposition of prior legislation.

### § DL-1 Disposition of legislation.

Enactment	Adoption Date	Subject	Disposition
L.L. No. 1-2003		Moratorium on retail building permits and variances	NCM
Ord.	1-13-2003	Ponds	Ch. 87
Ord.	5-26-2003	Alarm systems amendment	Ch. 35
	8-11-2003	Dog licensing and impoundment amendment	Repealed by L.L. No. 8-2010
	10-27-2003	Building permits, sewers, subdivision of land, water, and street acceptance amendments	Ch. 44; Ch. 93; Ch. 99 (repealed by L.L. No. 5-2017); Ch. 113; Ch. A121
	11-24-2003	Parks amendment	Ch. 84
L.L. No. 1-2004	9-13-2004	Zoning amendment	Repealed by L.L. No. 4-2017
L.L. No. 2-2004		Moratorium on subdivision of land	NCM
L.L. No. 3-2004		Surcharge on vehicle and traffic violations	NCM
L.L. No. 1-2005	3-14-2005	Dogs at large	Repealed by L.L. No. 8-2010
L.L. No. 2-2005	9-12-2005	Historic property tax exemption	Ch. 101, Art. IX
L.L. No. 1-2006	2-13-2006	Zoning Map amendment	NCM
L.L. No. 2-2006	2-27-2006	Sex offenders: residency restrictions	Ch. 94, Art. I
L.L. No. 1-2007	7-9-2007	Officers and employees: residency and other requirements	Ch. 19, Art. I
L.L. No. 2-2007	7-9-2007	Subdivision of land amendment	Repealed by L.L. No. 5-2017
L.L. No. 3-2007	7-9-2007	Farming: right to farm	Ch. 62, Art. I
L.L. No. 4-2007	11-13-2007	Officers and employees: residency and other requirements amendment	Ch. 19, Art. I
L.L. No. 5-2007	12-10-2007	Sewers amendment	Ch. 93
L.L. No. 6-2007	12-10-2007	Stormwater management; flood damage prevention amendment; site plan review amendment; subdivision of land amendment; zoning amendment	Ch. 68; Ch. 95; Ch. 96; repealed by L.L. No. 5-2017; repealed by L.L. No. 4-2017
L.L. No. 1-2009	2-9-2009	Dog licensing and impoundment amendment	Repealed by L.L. No. 8-2010
L.L. No. 2-2009	7-13-2009	Open development areas	Repealed by L.L. No. 2-2012
L.L. No. 1-2010	1-11-2010	Building permits amendment	Ch. 44
L.L. No. 2-2010	2-8-2010	Moratorium on wind energy conversion systems	NCM
L.L. No. 3-2010	7-12-2010	Dogs and other animals: dogs at large amendment	Repealed by L.L. No. 8-2010
L.L. No. 4-2010	7-12-2010	Parks amendment	Ch. 84
L.L. No. 5-2010	8-24-2010	Retirement incentive program	NCM
L.L. No. 6-2010	9-13-2010	Moratorium on wind energy conversion systems	NCM
L.L. No. 7-2010	9-30-2010	Zoning Map amendment	NCM
L.L. No. 8-2010	12-13-2010	Dogs and other animals	Ch. 55
L.L. No. 9-2010	12-13-2010	Zoning amendment	Repealed by L.L. No. 4-2017
L.L. No. 1-2012	1-23-2012	Subdivision of land amendment; zoning amendment	Repealed by L.L. No. 5-2017; repealed by L.L. No. 4-2017
L.L. No. 2-2012	2-13-2012	Open development areas	Repealed by L.L. No. 5-2017
L.L. No. 3-2012	3-26-2012	Fire prevention and building construction: Building Department and permits amendment	Ch. 65, Art. I
L.L. No. 4-2012	9-5-2012	Abolishment of Receiver of Taxes position	NCM
L.L. No. 1-2013	7-8-2013	Zoning amendment	Repealed by L.L. No. 4-2017
L.L. No. 1-2014	4-14-2014	Zoning Map amendment	NCM
L.L. No. 1-2015	6-8-2015	Compensation	NCM
L.L. No. 2-2015	10-13-2015	Moratorium on open development area applications	NCM
L.L. No. 3-2015	10-13-2015	Moratorium on subdivision of land	NCM
L.L. No. 4-2015	10-26-2015	Cold War veterans exemption	Ch. 101, Art. IVA
L.L. No. 1-2016	3-28-2016	Penalty amendments	Ch. 35; Ch. 47; Ch. 59; Ch. 65, Art. II; Ch. 70; Ch. 81; Ch. 87; Ch. 91; Ch. 108; Ch. 109, Art. II; Ch. 109, Art. III; Ch. 116 (repealed by L.L. No. 4-2017)
L.L. No. 2-2016	4-11-2016	Moratorium on open development area applications extension	NCM
L.L. No. 3-2016	4-11-2016	Moratorium on subdivision of land extension	NCM
L.L. No. 4-2016	7-11-2016	Moratorium on solar power projects	NCM

Enactment	Adoption Date	Subject	Disposition
L.L. No. 5-2016	10-18-2016	Moratorium on subdivision of land extension	NCM
L.L. No. 6-2016	10-18-2016	Moratorium on open development area applications extension	NCM
L.L. No. 1-2017	1-9-2017	Taxation: tax bill enclosures	Ch. 101, Art. X
L.L. No. 2-2017	1-9-2017	Moratorium on solar power projects extension	NCM
L.L. No. 3-2017	3-13-2017	Solar energy systems	Ch. 95A
L.L. No. 4-2017	3-13-2017	Zoning	Ch. 116
L.L. No. 5-2017	3-13-2017	Open development areas repealer; subdivision of land and open development area	Ch. 79; Ch. 99 ✓
L.L. No. 6-2017	8-14-2017	Zoning Map Amendment	NCM
L.L. No. 1-2018	1-22-2018	Taxation: Veterans Tax Exemption Amendment	Ch. 101, Art. IV
L.L. No. 2-2018	10-9-2018	Taxation: Senior Citizens Tax Exemption Amendment	Ch. 101, Art. I
L.L. No. 1-2019	4-8-2019	Flood Damage Prevention	Ch. 68