

# Practical Insights Into The Changes Affecting Land Use, Planning and Zoning

## Part 2

### Cluster Subdivisions

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State enabling legislation that allows municipalities to consider the use of clustering for residential subdivisions has been around for decades. However, there are still questions as to how it should be interpreted and applied. Unfortunately these questions often ended up being answered by the courts. The Rural Resources Commission, through its' Land Use Advisory Committee, has rewritten this legislation to more clearly define the intent and the application of clustering. This revised statute is identical in town law (Sec. 278), village law (Sec.7-738) and city law (Sec. 37). References in this discussion will be to town law.

The previous version did not provide a clear definition of what a planning board could consider in granting an approval to a cluster subdivision application. While the legislation encouraged flexibility in the design of a cluster development, it failed to define exactly what the boards could address when granting waivers from existing zoning regulations and design criteria, other than a reference to "building plots or dwelling units". In an attempt to clarify the planning boards' role, the revised statute defines a "cluster development" as being: "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 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." (Sec. 278(1.)(a)).

In the past, planning boards would often limit their waiver rights to the size and configuration of lots and dwelling units, since this was the only guidance that the statute provided. The new definition now gives a planning board the flexibility to address "the applicable zoning ordinance or local law" that would regulate or place restrictions not only on "the layout, configuration and design of lots," but also on "**buildings and structures, roads, utility lines and other infrastructure**" (emphasis added) that may need to be changed or "modified to provide an alternative method". This should make it easier for applicants and planning boards to comply with the stated purpose of allowing clustering, which 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.**" (Sec. 278(2.)(b) emphasis added).

The application of clustering is not limited to residentially zoned districts. It is applicable to any zoning district in a municipality unless that municipality, in adopting a local law or ordinance, specifically limits the use of clustering to certain zoning districts.

There are two specific restrictions on clustering. Clustering cannot be used to increase the density or change the use of a parcel. However, it can be used to change from single family residential to multi-family residential, as long as the number of units are the same as that which could be developed under a conventional plan, conforming to the allowable lot size and density (Sec. 278(3)(b)). Once the planning board is satisfied that the number of units conforms to the requirements of the zoning district, the board then has the **discretion** to allow those units to be constructed "in detached, semi-detached, attached, or multi-story structures" (Sec.278(3)(d)).

The revised statute also addresses a proposed development, or plat, which may be in different zoning districts; "...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.**"(Sec. 278(3)(b) emphasis added). This allows a great deal of flexibility to the developer, and the planning board, when positioning units on a site, regardless of the specific density limitations originally applicable to any given portion of that site.

Even with this revised statute many planning boards may be reluctant to grant waivers to the requirements of their zoning ordinances, other than to those regulations addressing lot size. This reluctance will probably be based more on past practices than on a planning boards familiarity and comfort level with the expanded definition and its' implications.

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Prior to submitting an application for clustering, it would be worthwhile to meet with the municipal staff and representatives of the planning board to discuss the review and approval procedures, particularly if your plan proposes alternatives or modifications, other than lot size, to specific zoning regulations.

This article has appeared in the Empire State Builder magazine and the Empire State Surveyor.