

# **Build a Better Record**

## **Good Practices for Documenting Local Board Decisions**

# Don't Wait for the 78

# Documentation begins with the Documents

## What is a Document?

*“A written or printed instrument that conveys information.”*

➤ Webster’s dictionary definition

**→ BREAKING NEWS ←**

**Local Board Reviews  
Generate Documents**

**Applicant submitted**

**Local Board created**

**Public provided**

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## EXAMPLES

- ✓ Application Forms and Materials
- ✓ Consultant's Reports – applicant and your own
- ✓ Other Agency Reports
- ✓ Correspondence – both electronic and printed
- ✓ Meeting Minutes
- ✓ SEQRA EAF - Part I, Part II, and possibly Part III
- ✓ Public Input

**ALL** the Information in **ALL** the Documents  
Must Be Examined and Distilled Into

# THE DECISION

**Putting it in Pictures  
the Decision path evolves**

**FROM THIS**



**TO THIS**



# **Why** should a board care about **Documentation?**

**How many people think the answer is**

***“Because it’s required by the law”***

# Surprisingly that answer would be *partially incorrect* **BECAUSE**

- Supporting information is inferred in generalized terms
- Written documentation is specifically required only in a small number of instances in NYS laws
- “What type” of documentation is almost never clarified

## GOOD PRACTICE TIP

Look at your own local laws and see what documentation they specifically require  
– are you doing it correctly?

# SOME EXAMPLES OF LAWS

## Examples in NYS Town Law - ZBA

### § 267-a. Board of appeals procedure

1. *Meetings, minutes, records. Meetings of such board of appeals shall be open to the public to the extent provided in article seven of the public officers law. Such board of appeals **shall keep minutes** of its proceedings, showing the vote of each member upon every question, or if absent or failing to vote, indicating such fact, and **shall also keep records of its examinations and other official actions***
2. *Filing requirements. Every rule, regulation, every amendment or repeal thereof, and **every order, requirement, decision or determination** of the board of appeals **shall be filed** in the office of the town clerk within five business days and **shall be a public record***
9. *Filing of decision and notice. The **decision** of the board of appeals on the appeal **shall be filed** in the office of the town clerk within five business days after the day such decision is rendered, and a **copy thereof mailed** to the applicant*

## Examples in NYS Town Law – Site Plan/SUP

### § 274-a. Site plan review

8. *Filing of Decision. The **decision** of the authorized board **shall be filed** in the office of the town clerk within five business days after such decision is rendered, and **a copy thereof mailed** to the applicant*

### § 274-b. Approval of special use permits

6. *Filing of Decision. The **decision** of the authorized board **shall be filed** in the office of the town clerk within five business days after such decision is rendered, and **a copy thereof mailed** to the applicant*

## Examples in NYS Town Law - Subdivision

### § 276. Subdivision review; approval of plats; development of filed plats

#### 5. *Approval of preliminary plats*

(d) (iv) AND (e)(iv) *Grounds for decision. The grounds for a modification, if any, or the grounds for disapproval shall be stated upon the records of the planning board. When so approving a preliminary plat, the planning board shall state in writing any modifications it deems necessary for submission of the plat in final form*

(f) *Certification and filing of preliminary plat. Within five business days of the adoption of the resolution granting approval of such preliminary plat, such plat shall be certified by the clerk of the planning board as having been granted preliminary approval and a copy of the plat and resolution shall be filed in such clerk's office. A copy of the resolution shall be mailed to the owner*

## Examples in NYS Town Law - Subdivision

### § 276. Subdivision review; approval of plats; development of filed plats

#### 5. *Approval of preliminary plats*

(g) *Filing of decision on preliminary plat. Within five business days from the date of the adoption of the **resolution stating the decision** of the board on the preliminary plat, the chairman or other duly authorized member of the planning board shall cause a **copy of such resolution to be filed** in the office of the town clerk*

#### 6. *Approval of final plats*

(i) (4) *Grounds for decision. The **grounds for a modification**, if any, or the **grounds for disapproval shall be stated upon the records** of the planning board*

## Examples in NYS Town Law - Subdivision

### § 276. Subdivision review; approval of plats; development of filed plats

*(ii) (3) Decision. The planning board **shall by resolution** conditionally approve, with or without modification, disapprove, or grant final approval and authorize the signing of such plat as follows*

*7. Certification of plat. Within five business days of the **adoption of the resolution** granting conditional or final approval of the final plat, such plat shall be **certified by the clerk** of the planning board as having been granted conditional or final approval and a **copy of such resolution and plat shall be filed** in such clerk's office. A **copy of the resolution shall be mailed** to the owner. In the case of a conditionally approved plat, such **resolution shall include a statement of the requirements** which when completed will authorize the signing thereof. Upon completion of such requirements the plat shall be signed by said duly authorized officer of the planning board and a **copy of such signed plat shall be filed** in the office of the clerk of the planning board or filed with the town clerk as determined by the town board*

## And let's not forget Federal Legislation

.....this legislation is a bit more specific

### Telecommunications Act of 1996

*Any **decision** by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities **shall be in writing and supported by substantial evidence contained in a written record***

*similar language is located in*

**NYS Village Law**

**NYS General City Law**

**NYS General Municipal Law**

And other NYS Laws

For further information and examples see

***“Guide to Planning and Zoning Laws of New York State  
James A. Coon Local Government Technical Series”***

[www.dos.ny.gov/lg/publications/Guide\\_to\\_planning\\_and\\_zoning\\_laws.pdf](http://www.dos.ny.gov/lg/publications/Guide_to_planning_and_zoning_laws.pdf)

## *Look at the language in the laws...*

*shall be filed*

*shall also keep records*

*shall be a public record*

*copy thereof mailed*

*shall be stated upon the records*

*statement of the requirements*

*shall by resolution*

**There's a common theme but  
notice what's missing ?**

**The law describes the  
actions required involving the  
decision but does not define**

***“WHAT constitutes a  
complete decision”***

**In fact**



**NYS legislative  
planning and zoning language\*  
includes**

***specific requirements or defines***

**what is required for a  
complete board decision**

**\*some local law language may address this, however**

**“WHAT constitutes a  
complete decision”  
is up to the local board  
to decide for themselves**

**So...**

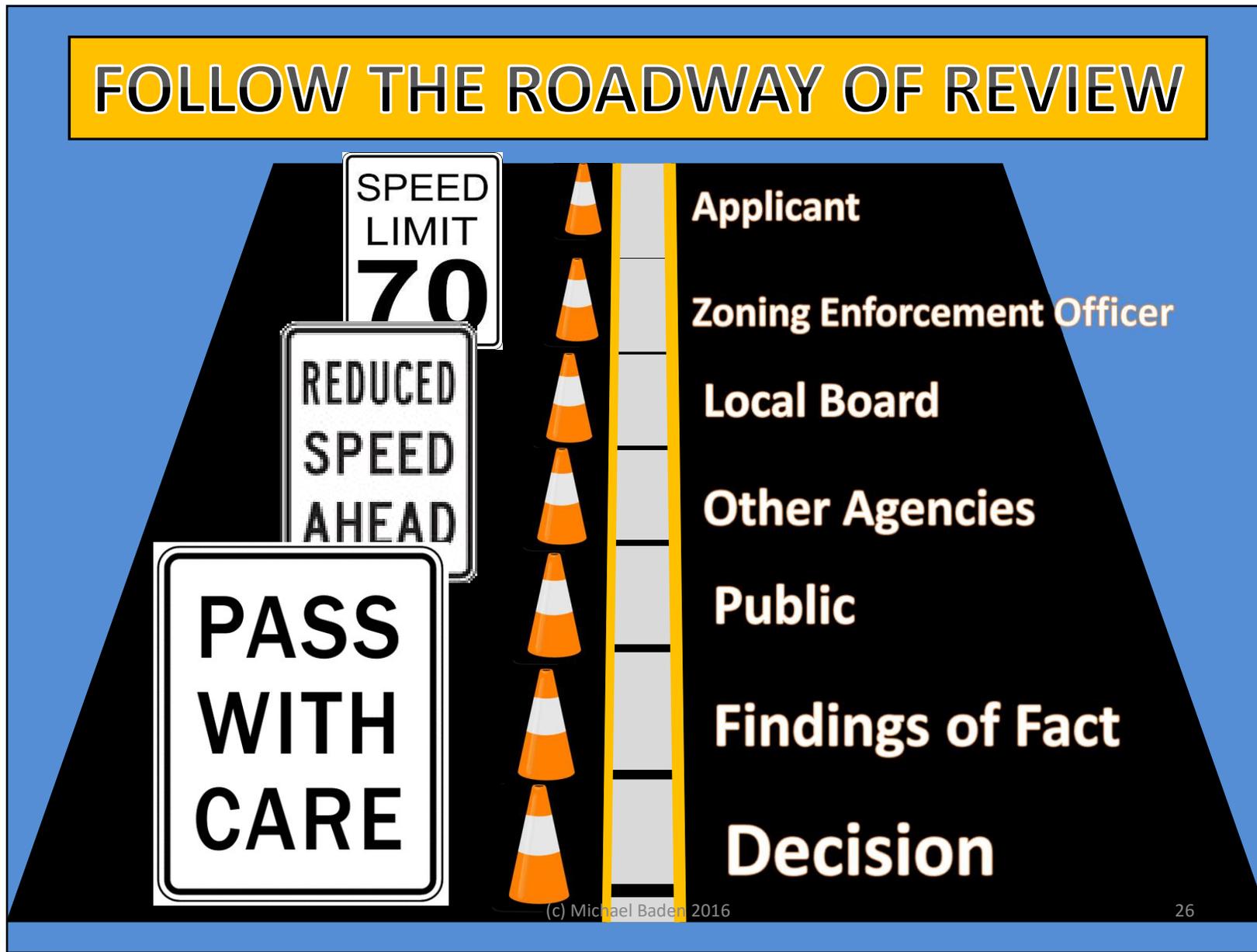
**If it's Not Required  
why bother  
Writing a decision at all?**

**With no specific mandated requirements  
a board might reason they aren't required  
to do anything more than adopt  
a "yea or nay" resolution**

**Simply vote approved or denied  
by voice vote and be done**

**BUT**  
**BEWARE**

**THAT WOULD LEGALLY  
MEET THE  
REQUIREMENTS OF LAW  
BUT THERE IS A  
BETTER WAY**



**Think of the decision as the  
culmination of a process rather  
than simply the answer to a question**

**Write a decision addressing the COMPLETE review**

- Summarizes the review and answers the question
- Analyzes and establish the record
- Cites documented information sources
- Certifies the decision as the defending source
- Communicates effectively and efficiently
- Is understood by the present and future reader

**or put another way...**

***(with apologies to the SEQRA Cookbook)***

# Decision Stew

Serves Everybody

1 cup Application Forms, Plats, Maps, and Site Plans

1 cup Studies and Reports

(e.g. Traffic, Environmental, Noise, Stormwater, etc.)

1 cup Meeting Minutes

1 cup Input and Permits by other Agencies

1 cup SEQRA EAF Forms

1 cup Public Input

Dash Other Information Sources

## Directions

- Add equal amounts of good quality **documents**
- Sift ALL ingredients until **findings of fact** rise to the top
- Stir together findings thoroughly until **decision** is achieved
- Decision **will not “spoil in court”** if produced correctly

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**10 TIPS**  
for a  
**SUCCESSFUL**  
and **THOROUGH**  
**REVIEW**

## TIP #1

### Be a Creature of Habit

#### FIRST RULE

**Review the Same Way**  
**Every Application**  
**Every Decision**  
**Every Time**

# The Decision Making Process

## FIRST

- Identify all the legal standards
- Identify all the relevant facts
  - Begin creating a record

## THEN

- Analyze the facts in relation to the legal standards
- Make a final determination

## TIP #2

**Strong Decisions  
Begin with Strong  
Local Board  
Review Practices**

## Establish Strong Application Review Practices

- Follow open meetings practices
- Discuss applications in public meetings – not e-mail
- Be specific in board requirements of documentation
- Request source of documents and authors credentials
- Identify the key components and the law
- Acknowledge or correct errors when discovered

### GOOD IDEA – but not legally required

- No SEQRA legal requirement to correct EAF Part I form errors
- Request applicant initial and date corrections or, if substantial, submit amended form with corrections

## **TIP #3**

# **Build and Establish the Record**

**A complete record leads  
to a complete decision**

**Don't Forget To Include**

- **Personal Observations of Board Members**
- **Expert Opinions**
- **Ex Parte Communications**

## Personal Observations

- Member may have personal knowledge of a site under consideration for a land development
- Perhaps they grew up near the site and know of seasonal flooding or of dumping of materials on the property
- Observations should be included either in the minutes, or in a personal statement offered for the record
- If the board's denial or the conditions put on the approval are challenged, a judge can't read the minds of board members
- Put what you know in writing

## Establish Relationships with Other Agencies

- Utilize other agencies as source of expertise
- “Free Advice”
- More benefits than just to fulfill SEQRA requirements

### Examples

- State, County or local Highway Dept.
- Emergency Personnel – Fire, Ambulance, Police
- School Districts
- State – DEC, Ag & Markets, SHPO
- County - Board of Health, Planning Dept.
- Local Commissions – Environmental, Historic
- \*Private Organizations – Not-for-Profits \*exercise caution

## Ex Parte Communications

- The record should include any ex parte communication
- *Ex parte* communication occurs when a board member and an applicant, applicant's representative, or member of the public discuss a pending application outside the context of a public meeting or hearing
- **ALWAYS** try to avoid "off-the-record" discussions
- Encourage the other parties to share their opinions and observations in a letter to the board or an appearance at a public meeting or hearing
- If the private interaction occurs, disclose *ex parte* communication at the next board meeting so it can be included in the record

## TIP #4

# Develop Strong Records Management

- Strong records management leads to sound decisions
- Establish universal records management policies
- Establish procedures for accepting information
- Don't rely on memory – write it down and file it
- Document verbal discussions (i.e. phone calls)
- Save everything including e-mail correspondence
- **Document, Document, Document... EVERYTHING**
- Create an application reference “cheat sheet”
  - Include dates
  - Attach inside the front cover of the file

**TIP #5**

**Meeting Minutes  
are an  
Invaluable Tool  
when Drafting  
the Decision**

## Requirements for Minutes

**When do minutes have to be taken and what has to be included in the minutes?**

- **Article 7 of the Public Officers Law contains the Open Meetings Law**
- **Section 106 requires a board to take minutes of a meeting if there are any motions or proposals made or votes taken**
- **Minutes must be in writing and cannot be maintained only on audio or video tape**
- **The Committee on Open Government answers questions and posts its opinions on the DOS website**

# Meeting Minutes

## Common items contained in the minutes

- Heading
- Attendance
- Time meeting and/or hearing began and ended
- Approval of previous minutes
- **Summary of reports and announcements\***
- **Summary of discussion\***
- Proposals, resolutions & motions
- Results of votes

**\*optional**

## Meeting Minutes

- Meeting minutes must always reflect motions and resolutions

### Word-For-Word

at a minimum

- There is no right or wrong way to take minutes as long as they contain motions, resolutions and votes
- Minutes provide information about what happened for people not present at the meeting [members, public, applicant]

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## Meeting Minutes

Depending on the level of detail minutes can be

...The bare minimum of a meeting

**OR**

...An interesting account of board  
discussions and decisions

**OR**

...Detailed enough to track the evolution  
of issues and applications

# “Minutes of Narration” Style

## Synopsis of Meeting

- **This style includes an account of the discussion that took place at the meeting and important details of the discussion**
- **Consider presenting the information logically or topically, not necessarily chronologically**

## **“Comprehensive Minutes” Style**

### **A full account of the meeting**

- **Record of discussions that includes the names of all the speakers and what was said**
- **May approach a verbatim account of the discussion**
- **This level of detail is not always practical and may not be a reasonable request of the clerk**
- **A good source of information on this topic is Committee on Open Government Opinions numbers 3658 and 4801**
- **Best to leave out offensive or inappropriate language from the minutes, even if it was used at the meeting**

## Public Hearing Minutes

**A public hearing is a session at which public comment is allowed on a particular issue**

- **The written account should contain at least a general detailing of the views expressed by the people offering public comment**
- **Stenographic record of a hearing is best, but expensive**
- **Many boards opt to summarize the comments and to tape record or film public hearings to preserve the details if questions later arise**
- **No requirement for the speakers to identify themselves or their addresses**

## Legal Aspects of Minutes

**Become part of the permanent record**

**Proofread for typographical and grammatical errors**

**Minutes usually contain statements that indicate that the board followed proper procedure**

### **Legal Checklist:**

- **Was proper procedure followed?**
- **Did members with conflicts recuse themselves?**
- **Did previously absent members review the record?**
- **Were SEQRA determinations made?**
- **Was meeting notice given?**

## Responsibility for Minutes

- Boards typically employ clerks or secretaries to record the board's minutes
- Boards should establish policy on the level of detail the minutes will reflect
- If no clerk is provided, a board member will need to record at least the minimum legally required minutes
  - The Dept. of State recommends this be avoided
  - Difficult for the member tasked with recording the minutes to participate in the meeting
  - May be aided by the use of a tape recorder
  - A member may not be employed as the secretary\*

\*explained in Attorney General's Opinion 2005-17

## **Approving Minutes**

- **Approval is common but there is no requirement in state law that minutes be approved**
- **Most boards have a practice to correct and approve the previous minutes at the following meeting**
- **May be a local law or procedural rule requiring such approval**
- **Corrections or additions may be made to the original version of the minutes or may be included in the minutes of the following month**
- **Corrections made at any time, even long after approval**
- **A member may approve a meeting they were absent so long as they have read and understood the minutes**

## Availability of Minutes

**When minutes must be made available to the public is spelled out in the Open Meetings Law**

- Meeting minutes of all public bodies must be made available within two weeks from the date of the meeting
- Minutes of an executive session must be made available within one week

**Distributing minutes that haven't been approved?**

- A good practice is to mark the minutes as “unapproved”, “draft”, or “not final” prior to posting or distributing them
- Allows notice that corrections may be made prior to final approval

## TIP #6

**UNDERSTAND** the  
**INS** and **OUTS** of  
**SEQRA**

**LEARN** the **PURPOSE**  
**RESPECT** and **DON'T ABUSE IT**

## TIP #7

# Determine Administrative Findings or Findings of Fact

An **Analysis** Which  
Applies **Law to Facts**,  
Leading to **Conclusions**

# *Findings of Fact*

**Provide boards with a  
vehicle for successfully demonstrating  
full compliance with all procedural  
and substantive requirements of law**

**Statements which, with analysis, connect the legal requirements governing the determination made to the facts contained in the record.**

**They are something more than mere reiteration of legal requirements and facts.**

***Proper findings can demonstrate that the "administrative agency determination is shored up by substantial evidence." \****

\*300 Gramatan Ave. Associates v. State Division of Human Rights, 45 N.Y.2d 176, 181 (1978)

## FINDINGS

- Important step in board decision making practice
- Establishes the documented record
- In legal challenges the courts will look to the documented record as the basis for their decision
- **BUT** there is no legal requirement to adopt or document findings ... **It's Just a GOOD IDEA**

### Exception - SEQRA Findings

- *A written findings statement is required as part of the SEQRA review prior to an agency's decision on an action that has been subject to a Final EIS*
- *SEQRA and local decision findings may be combined*

## How to Develop Findings of Fact

First, findings must specifically *identify facts* found in the record which the board considers relevant in the application of the substantive legal standard relating to their decision.

Second, findings must evidence some *analysis of those facts* in relation to the substantive legal standard.

# How to Develop Findings of Fact

## How To Accomplish This - First Steps

### *List the Facts, Just the Facts*

- Findings tell the application story
- Go to the documents – application, minutes, SEQRA forms, studies, correspondence, etc. – everything in the project file
- Ask and answer the **WHO, WHAT, WHERE, WHEN, WHY, HOW**
- Identify and outline the facts with supporting data details
- Make a list - Group facts together by similar topics
- May overlap information stated elsewhere in the decision – it's still a fact
- **If it looks like a fact, it probably is a fact - Include it on the list**

# How to Develop Findings of Fact

## Some Examples of Facts – Questions to Answer

- What path did the application take before reaching the board
- What is the detailed proposed action
- Where is the project located – address, S/B/L, zoning district
- What is the access to the parcel – road type – jurisdiction
- What is the acreage of parcel and acreage to be developed
- What is the existing parcel use – Is this a new use or an expansion
- What are existing development improvements – structures, utilities, access, etc
- What is the topography of parcel – wetlands, flood zone, slopes, forest, vacant land, etc
- What other agencies will issue permits or approvals

# How to Develop Findings of Fact

## Now Answer the HOWS

- Does the action proposed meet development standards of local laws – How does it meet standards
- How does the proposal address standards of local codes – parking, lighting, landscaping, stormwater, etc.
- What are the applicant proposed mitigation measures for issues
- Are there existing approvals – local and other agency permits – include names and dates
- What new permits will be required
- What did other agencies say about the proposal
- What are the consultant reports data and conclusions and how does it pertain – both applicant and local board retained
- Were any local board votes taken during the review - include reasons and dates – Especially if involving waiver of requirements

# **How to Develop Findings of Fact**

## **How To Accomplish This - Next Steps**

- **Arrange the items logically (e.g. by topic or chronological)**
- **Present and discuss the information at a public board meeting**
- **Board members should weigh the evidence provided as a group**
- **Determine whether compliance with the laws are established by the facts, or would be established if conditions were added to the approval**
- **Should be able to support why a condition was imposed**
- **Findings relate the facts to the legal standards**

# How to Develop Findings of Fact

## How To Accomplish This - Next Steps

### One Method

- ✓ Chairperson reads each item
- ✓ Board members offer suggestions for edits
- ✓ Insert corrections/deletions/additions as the board directs
- ✓ Consensus of Board reached on each edit
- ✓ Chairperson requests a motion/second to adopt
- ✓ Vote to adopt the Findings of Fact by resolution
- Include the adopted Findings of Fact and voting details as a component of the written decision

# How to Develop Findings of Fact

## Helpful Hints

- **Draft Findings may be prepared by the planner, attorney, Chairperson, or any board member**
- **Involve applicant only to answer questions requiring clarification – DO NOT allow to evolve into “negotiations”**
- **No fact is insignificant - Include basic facts easily taken for granted**
- **Only include facts with supporting documentation**
- **Separate fact from opinion – Don’t make “new facts”**
- **Conclusionary statements must be factually supported**
- **No requirement of prior board discussion to be a fact**
- **Board disagreement on a finding - leave it out or take a vote**
- **Unanimous decision to adopt is preferred – Achieve consensus**
- **Adopt Findings of Fact as an independent resolution**

## TIP #8

### WHEN IS THE BOARD READY TO DECIDE?

*Sooner or Later It's Time*

A board may make a decision only when **ALL** of the requirements specified in state statute or local law are addressed.

## Make Sure the Record is COMPLETE

- **Adopt no decision before it's time**
- **Utilize the legal timeframes of action to achieve a good review when questions still linger**
  - The board has 62 days after the close of public hearing to decide action**
- **Haste makes waste**
  - Discuss but wait to vote if new pertinent information is revealed during public hearing**

## **But Also**

- **Don't unnecessarily delay the decision "just because"**
- **For simple reviews with minimal public hearing input expectations prepare a draft decision ready for vote that same meeting**

**It can always be amended during discussion**

**Creates good applicant/board interaction reputation**

**Encourages stronger applications and timely information**



“Let’s hold off making a decision until we have even more information we don’t really need.”

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## TIP #9

### Be Prepared – Draft a Decision

- **ALWAYS** have a draft written decision prepared before the public meeting where the board **expects** to vote
- A findings of fact driven decision will write itself  
“Details, Details, Details”
- Board should never vote on a decision that is not detailed in front of them
- Don’t write one “on the spot”

## **Be Prepared – Draft a Decision**

- **Chairperson can prepare the draft themselves or request the planner, attorney, or another board member**
- **If the draft is pre-distributed to the board it may need to be treated as a published resolution – consult your board attorney**
- **Chairperson responsibility to anticipate when ready for decision based on application progress and legal timeframes**
- **Board member responsibility to be prepared to vote**

## TIP #10

# REMEMBER

Planning Boards,  
Zoning Boards of Appeals,  
Historic Preservation Boards  
and  
Environmental Quality Review Boards  
are subject to standard rules of  
administrative law and do not have  
**unfettered decision-making authority.**

**One Method to**  
**Prepare a Strong**  
**Written Decision**  
*A tried and true*  
*court-tested approach*

## 9 Elements of the Written Decision template

1. Header and Formatting
2. “Nuts and Bolts” or the Administrative Information
3. Board Processing and Review
4. Findings of Fact
5. County Planning Board Referral (if applicable)
6. The Declaratory Resolution
7. Actions to be Completed or Reasons for Denial
8. The Effect of the Decision – Timeframes
9. The Signature and cc Section

Combined into **ONE Complete Document**  
Do it the **SAME WAY** - Every Decision - Every Time

## **1. Header and Formatting**

- **Keep it simple - use a letterhead or logo that easily identifies the document as being “yours”**
- **Be consistent in format**
- **Number the pages**
- **Include an identifying header or footer with the name, application number, and date of decision so the information is printed on each page**

## **2. “Nuts and Bolts” or Administrative Information**

- **Who are you (Board Name)**
- **Decision Date**
- **Decision Number**
- **Review Type(s)**
- **Type of Decision**
- **Applicant name**
- **What is being applied for**
- **Address**
- **Parcel Section/Block/Lot Number**
- **Acreage of Parcel - Acreage of each lot**
- **Local zoning district(s) - may be more than one**

### **3. Board Processing and Review Recordkeeping and SEQRA**

- **CEO (ZEO) determination**
- **Zoning permit ID number AND date**
- **Board application ID number**
- **Date application filed**
- **Date EAF filed**
- **SEQRA typing AND date**
- **SEQRA determination AND date**
- **Listing of SEQRA Involved and Interested Agencies (if any)**
- **Listing of Non-SEQRA agency referrals**

### **3. Processing and Review**

#### **Documents and Public Hearing**

- List every document reviewed or discussed
  - Include source or who prepared it, date of document, and/or date received
- Public Hearing
  - Distribution of notices
  - Date(s) and location
  - Reference the meeting minutes

## Some Examples of Documents the Board May List

- Zoning Permit
- Local Application Form
- SEQRA EAF Part I
- Narrative Description of Proposed Project
- Agricultural Data Statement - if located in Cty Ag District
- Surveys, Plats, Site Plans
- Contour Maps, and/or Aerial Maps
- Flood Zone and/or Wetland Maps
- Deeds and Easement Agreements
- Architectural Drawings and Renderings
- Consultant or Studies and Reports
- Other Agency Studies and Reports
- Local Codes or Laws

## Some Examples of Documents the Board May List

- Board Member Statements
- Existing Permits or Applications for Permits
- Historic Register Information
- County Planning Board comment
- Emergency Services comment
- Written Correspondence and Emails
  - from applicant and other agencies
  - from the public
- Prior Land Use decisions
- NYS or Federal Legislation or Rules and Requirements
- Court Decisions
- My Rule of Thumb - If the board accepted it, Include it

## 4. Findings of Fact

### REMEMBER

- Put It In Writing
- Summary and Analysis of the Record
- Identifies how the laws are supported by the facts
- Vote to adopt **INDEPENDENT** of the decision

## **5. County Planning Board Referral**

- **General Municipal Law 239-m and -n require some local matters to be referred to the county for recommendation**
- **The local board may not make a decision until the earlier of the following occurs:**
  - either, the local board receives a report from the county planning agency ,**
  - or**
  - thirty days have passed since the county planning agency's receipt of a full statement of the matter from the local board**

## 5. County Planning Board Referral

- County Planning Board referral returned with either “Required Modifications” or “Disapprove” requires a **local board majority + 1 vote to overrule** by law . “Advisory Comments” and “No County Impact” do not share that requirement
- The local board must report its decision to the county planning agency within 30 days after final action
- A sometimes overlooked part of the law is a local board is required to state **WHY** it voted to overrule **AND** file a copy of that reasoning with the county

## 6. Declaratory Resolution

### Format of the Declaratory Resolution

- Be clear and concise in the approval/denial
- State the agency making the resolution
- State what type of decision is being granted/denied
- State to whom it is being granted/denied
- State what action EXACTLY is being granted/denied
- State where – property address, S/B/L, and zoning district

## 7. Requirements or “Conditions” of Approval

### Two types of Conditions

Commonly known as “Conditions of Approval”

- “Actions to be Completed”
- “Perpetual Restrictions”
- Must be directly related to and incidental to the proposed use of the property
- Based on Community Health, Safety and Welfare
- Be specific as to what the actions are and when they must occur
- Put It In Writing – Don’t leave to assumption

## 7. Actions to be Completed

### Actions Prior to Permit

- **“Actions to be completed”** are requirements that must be completed PRIOR to final approval, the issuance of a building permit, or Certificate of Occupancy
- Remember a Board may require bonding to insure completion

## **7. Actions to be Completed**

### **Examples**

- **Securing other agency permits**
- **“Housekeeping”**
  - **plan revisions to correct errors and omissions**
- **Health and safety items**
- **Specific construction**
  - **roadways, stormwater, infrastructure**
- **Access**
- **Installation of Signage**
- **Landscaping**
- **Lighting**
- **Phasing Plans**
- **Fees that must be paid**

## 7. Actions to be Completed

### Actions Prior - Examples of Language

- ***“Applicant shall secure the following specific permits prior to construction and all conditions of these permits shall be made a part of this Special Use permit approval.”***
  - Town of \_\_\_\_\_ building permit
  - NYSDEC Freshwater Wetlands permit
  - Ulster County Health Dept. septic and public water supply
  - Ulster County Dept. of Public Works access permit
- ***“Should any condition(s) imposed by these permit approvals cause a conflict to occur, the more restrictive condition(s) shall prevail. Should any permit approvals cause a change to the signed site plan, the matter shall be referred back to the Planning Board for action”***

## 7. Perpetual Restrictions

**“Perpetual restrictions”** are requirements or restrictions remaining with the land as long as the use remains

- **Balance the benefit to the property owner against the potential adverse impact of that development on the surrounding area and community**
- **Verify with certainty the local board has the legal authority to apply the restrictions – consult your attorney and local laws**

**e.g. If a Board restricts “how or when a business operates”, the restriction should be consistent and be imposed on all decisions of that type of use, not just a specific application**

## 7. Perpetual Restrictions

### Examples

- **Renewal of Permit**  
e.g. Permit is for a specific duration
- **Types of Use**
- **Maintenance or Utility Agreements**
- **Parking**
- **Landscaping**
- **Lighting**
- **Restrictions on Operation**  
e.g. Decibels, Hours, Days, etc.
- **Restriction on Re-subdivision**

## 7. Perpetual Restrictions

### Perpetual Restrictions - Examples of Language

- *“All current or future Local, County, State, and Federal Laws or Codes shall be complied with for the use of these lands.”*
- *“Parking shall only be allowed in the spaces designated on the approved and signed Site Plan. Parking shall not be allowed within the public road right-of-way, within the driveways, or within designated Site Plan traffic aisles at any time.”*
- *“All landscaping, as identified on the signed site plan to be retained or added, shall be maintained and replaced if dead or diseased with like-kind plantings”*
- *“There shall be no overnight accommodations provided to members or their guests”*
- *“The lots created with the approval of this subdivision shall be restricted from further subdivision”*

## 7. Conditions of Approval

### Administration

- State who has the authority to administer the requirements

### Examples of Language

- *“The Planning Board grants the Chair the authority to certify such conditions as complete and to sign the site plan at such time”*
- *“Any and all fees due to the Town of \_\_\_\_\_ involving this application shall be certified by the Chair as paid in full prior to the Chair’s signature on the site plan”*
- *“The Code Enforcement Officer shall determine the maximum occupancy allowed for each structure “*

## 7. Denial

- **Put It In Writing**
- **Be specific as to what is denied and why it is denied**
- **Elaborate in detail the reasoning and basis for the denial**
- **Cite facts and figures for denial in reasoning**
- **In a mixed approval/denial where some actions may be approved while others denied be very clear to distinguish the difference**
- **Protects the board from challenge of an arbitrary and capricious decision**

## **8. Effect of the Decision – Timeframes**

- **Specifically state the duration an approval is valid and the timeframe actions must be completed**
- **NYS Subdivision, Site Plan and Special Use laws specifically state the time allowed for an approved action to be completed**
- **Local decisions must follow NYS laws duration of validity unless local law specifically grants a longer duration**
- **An approved subdivision plat must be filed with the County Clerk within 62 days of signature or it is automatically invalidated**

## 8. Effect of the Decision – Timeframes

- **Some applicants are unaware**
  - Include the “rules” in writing
- **State the consequences for not completing the actions required for approval**
- **If an extension process is available under local law, state the requirements to secure the extension**

## 8. Effect of the Decision – Timeframes

### Examples of Site Plan and Special Use Language - Effect of Approval

- *“This Site Plan approval and associated conditions shall be binding upon the applicant and all successive owners of the land so long as such use shall occur”*
- *“This approval shall remain effective as an authorization to secure the required permits and establish the use for a maximum of one year from this date of approval unless the applicant shall have submitted written request and the Planning Board shall have adopted such resolution granting an extension and provided the applicant has submitted proof of having diligently pursued the implementation of the plans. Absent such an extension the Site Plan shall be deemed to have expired.”*

## 8. Effect of the Decision – Timeframes

### Examples of Subdivision Language - Effect of Approval

- *“This Final Approval shall expire 180 days from this approval date unless condition 1 has been satisfied by the applicant and the plat is presented and certified as complete by the Chair. This period may be extended for additional 90 day periods upon application to and resolution by the Planning Board.”*
- *“The owner shall file in the office of the Ulster County Clerk such approved plat bearing the Chair’s signature within 62 days from the date of signature or such approval shall be deemed to expire without further notice in accordance with NYS Town Law §276. The owner shall have the responsibility to return three (3) Ulster County Clerk certified copies of the filed plat and any other related filings to the Planning Board within 30 days of such filing.”*

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## 9. Signature and cc Section

- Include date of adoption, name of members who made motion/second, and vote details
- Make sure it is signed and dated by Chairperson
- Include a cc (carbon copy) section listing every person/agency that will be supplied a certified copy of the decision

## Written Decision – Finishing Touches

- Required by NYS law to mail a copy to the applicant and file decision with Town Clerk within 5 business days
- Required by NYS law to file a “Final Action Report” to County Planning Board if such review was required by law
- Not required, but a good practice to attach a copy of the SEQRA determination , EAF Part I, II, and III, and County PB review

### GOOD IDEA

Supply a signed copy of the written decision to

- Agencies who may be issuing future permits  
e.g. building dept., highway supt., health dept., NYSDEC
- Every agency/person with a vested involvement in the review  
e.g. assessor, town attorney, applicant attorney/engineer

# BENEFITS of this FORMAT

## **The “One Stop Shopping” Decision**

**Summarizes everything a person or agency could ever want to know about the application, the review, and the decision all wrapped up into one concise document**

**Sources of data are listed in the decision  
A yea/nay resolution, although legally allowable, usually lacks this level of detail**

## Requirements of Actions/Reason to Deny

Formally states the actions required for approval or the reasons for the denial

Makes it clear to all the parties concerned

e.g. applicant, Board members, attorneys, engineers, Code Enforcement Officer, Building Inspector, other agencies, neighbors, ...

- What exactly has been approved or denied
- What actions are further required to complete
- Timeframes of what must be completed
- Perpetual restrictions attached to the approval

## Includes Findings of Fact

States and supports the “Findings of Fact” determined by the local board in the deciding of the decision which establishes the legal basis for the decision

Very important in the case of legal challenge

No need to search through endless pages of minutes and reports to find the supporting facts and conclusions

**GOOD IDEA** - Remember, it is a good practice for Findings of Fact to always be discussed in a public meeting and adopted by the local board by resolution and vote

## A FINAL THOUGHT ON FINDINGS

*“The process of making land use decisions has its rough edges: economic impacts, election campaigns, tender egos, and neighborhood conflicts. Making findings as an integral part of the decision making process will not guarantee that all of the rough edges will be smoothed out.”*

***However, if decision making officials take findings seriously, they can reduce the public's doubts about the wisdom of their decisions and reduce public skepticism about their motivations. Using findings builds an excellent defense for local officials' decisions, and ultimately more justly serves the public purposes of regulating land use.”***

**Nick Colas, AICP  
Principal Analyst**

**Cayuga County Dept. of Planning and Economic Development**

# **MOST IMPORTANTLY**

**Judicial review of local land use  
decisions is limited**

**A decision that is written  
supported by findings will stand  
up to Article 78 challenges**

*\*If the review was conducted legally and procedurally correct*

**A board determination will not be set aside unless there is a showing of illegality, arbitrariness or abuse of discretion**

**A decision which successfully relates the factual evidence to the applicable legal standards in the findings, is given great deference in court**

**If a decision is rational and is supported by substantial evidence, a reviewing court will not usually substitute its judgment for that of a local board even if an opposite conclusion might logically be drawn.**

**SOME NOTABLE  
COURT DECISIONS  
INVOLVING  
FINDINGS**

## Conley v. Town of Brookhaven ZBA

Court of Appeals of the State of New York

40 N.Y.2d 309 (1976)

The question presented for review is whether the zoning board of appeals abused its discretion, as a matter of law, in granting the respondents application for an area variance.

"After a review of the record, we find that there are facts from which the board could conclude that a variance should be granted ...Although a contrary conclusion might also be drawn, ...We may not substitute our judgment for that of the local zoning board, where there is substantial evidence in the record to support the board's determination."

## Cowan v. Kern et al.

Court of Appeals of the State of New York

41 N.Y.2d 591 (1977)

The sole issue presented on this appeal is whether the Zoning Board of Appeals abused its discretion, as a matter of law, in denying petitioner's application for a zoning variance.

".. .it is for locally selected and locally responsible officials to determine where the public interest in zoning lies ... It matters not whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them."

## Graham v. Town of Tully Planning Board

Supreme Court, Appellate Division, Fourth Dept, New York.

Decided: March 14, 1997

Respondent granted preliminary approval for 10 of 25 lots within petitioner's proposed subdivision, but made approval of the remaining lots “contingent upon a second access for those lots to a public highway other than the proposed access” on Gatehouse Road. Petitioner commenced this CPLR article 78 proceeding seeking to annul respondent's determination conditioning the approval of lots 11 through 25 upon a second access road.

## **Graham v. Town of Tully Planning Board**

**Supreme Court dismissed the petition.**

**Appellate reversed.**

**...Here, respondent failed to make findings supporting its determination that development of lots 1 through 10 was acceptable but that, absent a second access, development of lots 11 through 25 was unacceptable. The absence of such findings and the inadequacy of the evidence in the record to support respondent's determination requires vacatur of that determination and remittal of the matter to respondent for a hearing, proper findings and a new determination ...**

## **Loram Development v. Town of Huntington Planning Board**

**Appellate Division of the Supreme Court of New York, Second Dept  
53 A.D.2d 670 (N.Y. App. Div. 1976)**

**Petitioner filed a preliminary map with the Huntington Town Planning Board, which map provided for the development of two-family homes on approximately 4.36 acres of land. After a public hearing, the planning board denied approval of the map, without prejudice to the submission of a new design utilizing cluster techniques.**

## **Loram Development v. Town of Huntington Planning Board**

**...the planning board's findings are not supported by substantial evidence. The evidentiary material consists of letters and memoranda which are conclusory in nature and which were transmitted to the planning board subsequent to the hearing. Additionally, the planning board's findings pertaining to the purported excessive cost of the project do not furnish a proper ground for its denial of approval of the map...**

## Hobbs v. Albanese

Appellate Division of the Supreme Court of New York, Fourth Dept  
70 A.D.2d 1049 (N.Y. App. Div. 1979)

**Petitioners commenced this CPLR article 78 proceeding to compel respondents, the Board of Trustees of the Village of Manlius, to issue to them a special use permit allowing construction and operation of a McDonald's drive-in restaurant. The property in question is zoned commercial and the proposed use is permitted in the district subject to the owners obtaining a special use permit.**

## **Hobbs v. Albanese**

**The village board of trustees denied the application, finding**

- (1) that the proposed use would have an adverse impact on traffic congestion**
- (2) that it would alter the essential character of the area and**
- (3) that a previous application in 1967 for use of the premises as a gas station was denied.**

## **Hobbs v. Albanese**

**...The last two reasons are without merit...The remaining reason stated for denial was increased traffic congestion. We agree that relying upon the "public health" clause of the ordinance the board could lawfully deny a special permit if it found that an increased traffic problem special to the proposed use was demonstrated. The evidence in the record, however, is not sufficient to establish that petitioners' proposed use would have a greater impact on the traffic in the area than would other permitted uses not subject to special permits...**

## Genesee Farms v. Scopano

Appellate Division of the Supreme Court of New York, Fourth Dept  
77 A.D.2d 784 (1980)

**In this CPLR article 78 proceeding respondents appeal from a judgment directing them, as the Zoning Board of Appeals of the Village of Oakfield, to grant petitioner a building permit for the construction of a self-service gasoline island to be operated on petitioner's premises in conjunction with its ongoing operation of a dairy goods store. The trial court found that the proposed use did not constitute a service station, as defined by the ordinance, and that the proposed use was an accessory use to the operation of the dairy goods store. We reject both conclusions**

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## **Genesee Farms v. Scopano**

**By letter to the petitioner, dated August 1, 1978, the zoning board advised that it had ruled that the gas island was a gas station, and not an accessory use, and would require a special permit. The letter concluded:**

**"Granting of a variance would not be in harmony with the general purpose of the ordinance.**

**Granting a variance would be injurious to the neighborhood because of potential traffic safety problems for pedestrians and bicyclists, as well as increasing traffic congestion in parking lot and the street."**

**Petitioner was never afforded an opportunity to appear before the full membership of the zoning board.**

## Genesee Farms v. Scopano

**...On the sparse record before us it is impossible for this court to determine "whether there is substantial evidence to support the determination reached by the zoning board in denying petitioner an area variance."  
*(Matter of Fuhst v Foley, 45 N.Y.2d 441, 445)***

**The reasons given for the denial are conclusory and unexplained. The matter should be remitted to the zoning board of appeals for a new hearing to be conducted with adherence to the criteria to be applied to applications for an area variance ...**

## **Genesee Farms v. Scopano**

**...We also take note of petitioner's claim of unfair, prejudicial and discriminatory treatment by the zoning board. Since disclosure is the antidote to partiality and favor, we direct that a full record of fact finding and reasons for board action be made upon the new hearing so that in the event of any future judicial review the court will be enabled to make a final determination of the matter...**

## Frangella Mushroom Farms, Inc. v. ZBA of the Town of Coeymans

Appellate Division of the Supreme Court of New York, Third Dept  
57 N.Y.2d 811 (1982)

Petitioner owns a mushroom growing farm which normally employs over 150, mostly migrant, laborers. Petitioner applied for a special use permit to construct an apartment building on its farm to replace the laborers' substandard housing. Respondent denied the application, and petitioner has commenced the instant review proceeding. Under the town zoning ordinance, apartment buildings are a permitted special use in the R-A zoning district where petitioner's farm is located. Respondent, in denying petitioner's application for a special permit, made 17 specific findings. On the basis of the record, however, the findings are arbitrary and capricious, and, therefore, insufficient to sustain a denial

## Frangella Mushroom Farms, Inc. v. ZBA of the Town of Coeymans

...“The remaining objections to the permit contained in the findings consist of nothing more than general criticisms of the existing conditions of migrant farm workers on the farm and the problems to the town caused thereby. A permitted special use may not be arbitrarily denied without a rational basis, and denial solely because there is a general objection to the special use would be arbitrary” ...

...“The lack of evidence to support these findings is not salvaged by the fact that respondent's findings purport to be based in part on the personal knowledge of its members, since in this respect the board's decision contains only a bare conclusory statement without supporting facts to provide a basis for judicial review“...

## **John S. Bowers et al. v. Henry Aron et al.**

**Appellate Division of the Supreme Court of New York, Third Dept  
142 A.D.2d 32 (1988)**

**In April 1987, respondents sought permission to erect an inflatable plastic greenhouse on their property in the Town of Ithaca, Tompkins County, where they operate a fruit stand. The property is located in an area zoned for residential use, but their fruit stand constitutes a legal nonconforming use. During the prior year, a fire had destroyed a barn located on the property, and although the greenhouse apparently was not intended as a final replacement of the barn, they proposed to locate the greenhouse on the site formerly occupied by the barn.**

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## **John S. Bowers et al. v. Henry Aron et al.**

**The town zoning officer denied the request upon the ground that the proposed greenhouse constituted an extension of the nonconforming use. They appealed to the Town Zoning Board of Appeals, which ultimately granted permission to erect the greenhouse. Petitioners, neighboring landowners, commenced this CPLR article 78 proceeding to annul the Zoning Board's determination. Finding procedural and substantive flaws in the administrative process, Supreme Court annulled the determination, and this appeal ensued.**

## **John S. Bowers et al. v. Henry Aron et al.**

**...We also conclude that the Zoning Board's findings are inadequate to support the determination. The Zoning Board's findings consist of a recitation of the standards of the ordinance, with little or no attempt to correlate the evidence in the record to those standards. Thus, for example, the Zoning Board found that the construction of the proposed greenhouse "promotes the health, safety, morals and general welfare of the community in harmony with the general purposes of the Zoning Ordinance". There is, however, no explanation as to what evidence in the record was relied upon by the Zoning Board in reaching this conclusion...**

## John S. Bowers et al. v. Henry Aron et al.

...Conclusions without supporting facts are insufficient  
*(see, Matter of Frangella Mushroom Farms v Zoning Bd. of Appeals, 87 AD2d 962, 963, affd 57 N.Y.2d 811).*

Findings of fact should be made "in a manner such that the parties may be assured that the decision is based on evidence of record, uninfluenced by extralegal considerations" (*Matter of Simpson v Wolansky, 38 N.Y.2d 391, 396*).

The appropriate judicial remedy in these circumstances is to annul the determination and remit the matter to the Zoning Board for appropriate action to cure the defects in the administrative process...

**QUESTIONS?**

# **THANK YOU!**

**to all the Community Volunteers  
who give their time and energy  
to grow, preserve, and protect  
our communities**

**Michael Baden**

**mikebaden@aol.com**

**Ulster County Planning Board, Chairman**

**Town of Rochester Planning Board, Chairman**