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# Article

[Ed. Note: The *Pace Law Review* will publish a rebuttal to the following article in our Spring 1997 edition, Volume 17:2.]

## **The Unconstitutionality of Consolidated Planning Boards: Interlocal Planning Under New York Law**

**Albert J. Pirro, Jr.**

### Introduction

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.<sup>1</sup>

This Article will examine the nature and constitutionality of consolidated planning boards in light of the broad powers actually granted them. The issues surrounding the constitutionality of consolidated planning boards begs, yet again, Chief Justice Marshall's question respecting the extent of the power granted to the state governments. The question is whether a municipality may abdicate its power to regulate land within its own boundaries by delegating it to a separate planning entity.

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1. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

In 1926 the United States Supreme Court first recognized a municipality's ability to enact zoning and planning regulations in *Village of Euclid v. Ambler Realty Company*.<sup>2</sup> Prior to the *Euclid* decision, the constitutionality of comprehensive zoning and planning regulations was not uniformly upheld in the state courts.<sup>3</sup> In *Euclid*, the issue disputed was the constitutionality of a village ordinance which had divided the village of Euclid into six classes of use districts, three classes of height districts, and four classes of area districts.<sup>4</sup> The Supreme Court upheld the ordinance, stating, "[a] nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."<sup>5</sup>

By 1931, all states had authorized zoning and over 1000 municipalities had adopted zoning codes.<sup>6</sup> Today, a municipality's power to enact zoning regulations through the proper delegation of police power from the state legislature is widely recognized as constitutional. The term "Euclidean" zoning refers to classic "cookie-cutter" zoning and describes the early zoning concept of separating incompatible land uses through the establishment of fixed legislative rules that would be largely self-administering.<sup>7</sup> While today Euclidean zoning still provides the basic framework for the implementation of land use controls at the local level, the modern trend is towards more flexibility in land use planning and control.<sup>8</sup>

Nevertheless, there are limitations upon the power of a municipality to enact zoning and planning regulations and on the state legislatures in the delegation of that power to municipalities within their boundaries. First, a municipality may only exercise such police power as the state specifically delegates to it.<sup>9</sup>

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2. 272 U.S. 365 (1926).

3. 1 ROHAN, ZONING AND LAND USE CONTROLS, § 1.02(2)(1995).

4. *Id.* at n.21.

5. *Euclid*, 272 U.S. at 388.

6. 1 ZIEGLER, RATHKOPF'S THE LAW OF ZONING AND PLANNING, § 1.01(3)(a) (4th ed. 1992).

7. *Id.* § 1.01(3)(c).

8. *Id.*

9. *See, e.g.,* *Golden v. Planning Bd. of the Town of Ramapo*, 30 N.Y.2d 359, 369, 285 N.E.2d 291, 296, 334 N.Y.S.2d 138, 145 (1972) ("Towns, cities and villages lack the power to enact and enforce zoning or other land use regulations . . . . The

The state, in turn, may only enact such enabling statutes as comply with notions of equal protection and due process under both the federal and state constitutions.<sup>10</sup> As a result, when a government wishes to deviate from the concept of Euclidean zoning, it must do so without trampling upon private property rights.

Part of the move away from the framework of Euclidean zoning has been the implementation of consolidated or "joint" planning boards.<sup>11</sup> Over the last thirty years most state legislatures have decided to delegate to the municipal corporations of their states the power to enter into interlocal agreements for the creation of a joint or regional planning board.<sup>12</sup> Inclusive in

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exercise of that power . . . must be founded upon a legislative delegation to so proceed, and in the absence of such a grant will be held *ultra vires* and void . . . ." (citations omitted)); *Schilling v. City of Midland*, 196 N.W.2d 846, 847 (Mich. 1972) (holding that amendment which required subject property to permit construction of a shopping center was invalid because a municipality has no inherent power of zoning); *Kohl v. Mayor & Council of the Borough of Fair Lawn*, 234 A.2d 385, 389 (N.J. 1967) (holding that local zoning ordinances must comply with statutory requirements); *Thompson v. Smith*, 129 A.2d 638, 645-46 (Vt. 1957) (holding that the power of a municipality to enact zoning regulations exists only if authority was delegated by the state); *Kelly v. City of Philadelphia*, 115 A.2d 238, 243 (Pa. 1955) ("[I]n the absence of a specific legislative or constitutional grant, municipalities have no authority to enact zoning ordinances."); *Eden v. Town Planning and Zoning Comm'n of the Town of Bloomfield*, 89 A.2d 746, 748 (Conn. 1952) ("[Z]oning authorities can only exercise such power as has been validly conferred upon them by the General Assembly."); *Alabama Alcoholic Beverage Control Bd. v. City of Birmingham*, 44 So. 2d 593 (Ala. 1950) (enjoining enforcement of zoning ordinance prohibiting location of liquor stores because municipality has no inherent powers to enact zoning regulations absent express statutory authorization); *State ex rel. Helseth v. Dubose*, 128 So. 4, 6 (Fla. 1930) ("[Zoning] laws are restrictions on the use of private property that can be justified only in some aspect of the police power asserted in the interest of the public welfare, and cannot be enacted or enforced by municipalities without specific legislative authorization therefor.").

10. 1 ZIEGLER, *supra* note 6, § 2.02(1)-(3).

11. The Supreme Court recognized the municipal power to enact zoning regulations. These regulations, however, must find their "jurisdiction in some aspect of the police power, asserted for the public welfare." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

12. See, e.g., ARK. CODE ANN. § 14-17-304 (Michie 1995); CAL. GOV'T CODE § 65065.1 (West 1983); CONN. GEN. STAT. ANN. § 8-31a (West 1989); IOWA CODE ANN. § 28I (West 1995); KY. REV. STAT. ANN. § 100.121 (Michie 1993); ME. REV. STAT. ANN. tit. 30-A, § 4325 (West 1995); MASS. GEN. LAWS ANN. ch. 40B, § 3 (West 1994); MINN. STAT. ANN. § 462.354(1) (West 1995); NEV. REV. STAT. ANN. § 278.02786 (Michie 1995); N.J. STAT. ANN. § 40:8A-3 (West 1991); N.M. STAT. ANN. § 11-1-3 (Michie 1995); 53 PA. CONS. STAT. ANN. part I, ch. 7 (1995); TEX. LOCAL GOV'T CODE ANN. § 371.001(b) (West 1995).

the power to enter into intermunicipal agreements is the power to create joint, regional, or county commissions on planning and zoning. Surprisingly enough, these statutes have generated little controversy over the years.<sup>13</sup>

The history of regional planning in New York State shows that the topic has generated relatively little debate.<sup>14</sup> The New York State Legislature enacted Article 5-G of the General Municipal Law in 1960 to facilitate the cooperative activities of its municipal corporations.<sup>15</sup> This law (which was complemented by Article 12-B of the General Municipal Law)<sup>16</sup> delegated to the municipalities the power to create "metropolitan, regional or county planning boards."<sup>17</sup> These boards do not have final decision-making power, however, as the individual municipalities have authority to override their recommendations or to take action without any such recommendation.<sup>18</sup>

In 1992 the New York State Legislature passed section 284 of the Town Law, section 7-741 of the Village Law, and section 20-g of the General City Law.<sup>19</sup> These provisions authorize municipal corporations to create joint planning boards with unlimited powers.<sup>20</sup> When it created these statutes, the legislature

13. One possible explanation for the lack of controversy over the constitutionality of regional boards is that they have traditionally had limited and mere advisory authority and have had their powers expressly laid out in their respective enabling statutes. In other words, the municipalities that have chosen to participate in joint planning programs have retained enough autonomy so that they still have control over the direction of the land use in their communities.

14. For a history of regional planning in New York State, see Patricia E. Salkin, *Regional Planning in New York State: A State Rich in National Models, Yet Weak in Overall Statewide Planning Coordination*, 13 PACE LAW REV. 505 (1993).

15. N.Y. GEN. MUN. LAW § 119-m-p (McKinney 1986).

16. N.Y. GEN. MUN. LAW § 239-b-n.

17. *Id.*

18. See, e.g., *Frampton v. Zoning Bd. of Appeals for Town of Lloyd, Ulster County*, 114 A.D.2d 670, 494 N.Y.S.2d 479, 480 (2d Dep't 1985) (holding that town zoning board did not act unreasonably or irrationally so that its decision was controlling); *We're Associates Co. v. Bear*, 35 A.D.2d 846, 847, 317 N.Y.S.2d 59, 61 (2d Dep't 1970), *aff'd*, 28 N.Y.2d 981, 272 N.E.2d 338, 323 N.Y.S.2d 838 (N.Y. 1971) (holding that county planning commission had no authority to veto town's change of zone).

19. 1992 N.Y. Laws 724; N.Y. TOWN LAW § 284 (McKinney Supp. 1994); N.Y. VILLAGE LAW § 7-741 (McKinney Supp. 1994); N.Y. GEN. CITY LAW § 20-g (McKinney Supp. 1994). The law also appears in N.Y. GEN. MUN. LAW § 119-u (McKinney Supp. 1995), which was created pursuant to 1993 N.Y. Laws 242, § 7.

20. 1992 N.Y. Laws 724. The statute reads:

also expressly repealed former Article 5-J of the General Municipal Law.<sup>21</sup> While the legislature has not expressly repealed other limitations on the powers, functions, or creation of intermunicipal agreements as set forth in Articles 5-G and 12-B, it has done so implicitly through the delegation of plenary decision-making authority to consolidated planning boards.<sup>22</sup>

This Article will explore the constitutional dimensions of consolidated planning boards with emphasis on the point that joint planning boards with plenary decision-making power are per se unconstitutional.<sup>23</sup> Part I examines how consolidated planning boards may violate the Equal Protection Clause of the United States Constitution with particular emphasis on the abridgment of voting rights.<sup>24</sup>

Part II focuses on the three ways that a consolidated planning board can deny due process of law under both the federal

4. Intermunicipal agreements. In addition to any other powers granted to municipal corporations to contract with each other to undertake joint, cooperative agreements any municipal corporation may: (a) create a consolidated planning board which may replace individual planning boards, if any, which consolidated planning board shall have the powers and duties as shall be determined by such agreement . . . .

*Id.* In plain language the statute allows for the powers of the joint board to be determined by the terms of the agreement creating it. There are no limits to the power that an agreement may vest in the joint planning board.

21. See 1993 N.Y. Laws 242, § 5. The repeal of Article 5-J, which contained § 119-z of the N.Y. GEN. MUN. LAW, expressly destroyed any limitations on cooperative activity. Section 119-z provided:

Nothing in this article contained shall be held to repeal, limit or modify the jurisdiction, powers and duties of any state or local department, board, district, commission or authority, or any public corporation, or other agency, now or hereafter possessed . . . or to nullify, abate or otherwise affect any rights acquired or action taken heretofore or hereafter pursuant to such decision, order, license, permit, approval, or other act.

N.Y. GEN. MUN. LAW § 119-z (McKinney 1986).

22. Examples of these implicit limitations on joint municipal power include voting provisions for entering into such agreements (see N.Y. GEN. MUN. LAW § 119-o(1) (McKinney 1986)) and those contained in N.Y. GEN. MUN. LAW § 239-d (McKinney 1986) (providing for the powers of regional boards).

23. 1992 N.Y. Laws 724. All three statutes are entitled "[i]ntermunicipal cooperation in comprehensive planning and land use regulation." They confer broad powers on municipalities in regard to the formation and functions of joint planning boards. The express legislative intent was to promote intergovernmental cooperation through the illustration of the statutory authority under Article 5-G of the General Municipal Law to partake in intermunicipal land use regulation. *Id.*

24. U.S. CONST. amend. XIV, § 1. See *infra* part I.

and New York State Constitutions.<sup>25</sup> First, the consolidated planning boards improperly fracture the autonomy that the several municipalities enjoy regarding the creation and development of their own comprehensive plans. The comprehensive plans are necessary to promote the health, safety, and welfare of their unique constituencies. Second, the newly enacted New York statutes are overbroad and list no standards or guidelines which a joint planning board must follow. Third, a consolidated planning board may also deny due process when its enabling statute bears no relation to the health, safety or welfare of the community.

Part III examines how a joint planning board creates a legal impediment since layer upon layer of planning review will serve only to delay, prevent, or interrupt development projects and private property rights, by creating, in effect, a *de facto* moratorium on development.<sup>26</sup> This in turn may amount to a *de facto* taking of private property. Part IV examines why the New York statutes must be construed in the most narrow sense.<sup>27</sup>

This Article concludes that the statutes improperly delegate legislative power to an entity which in the absence of regulations encourage arbitrary, irrational, and capricious decision-making. This decision-making is beyond the control of even the electorate. In short, if municipalities wish to accomplish inter-governmental cooperation, they can do so through means which do not trample on the equal protection and due process rights of their citizens.

I. The Creation of a Joint Planning Board With Final  
Decision-Making Power is Per Se Unconstitutional  
Because It Constitutes a Violation of Equal Protection<sup>28</sup>  
by Abridging Voting Rights

Equal protection may be denied when a joint planning board divests the power each autonomous municipality enjoys in deciding for themselves how they should best use the land within their own borders. Equal protection requires that the

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25. U.S. CONST. amend. XIV, § 1; N.Y. CONST. art. I, § 6. See discussion *infra* part II.

26. See *infra* part III.

27. See *infra* part IV.

28. U.S. CONST. amend. XIV.

challenged governmental classification rest on grounds relevant to the achievement of a valid governmental objective. Further, the classifications must treat persons equally who are similarly situated under the law.<sup>29</sup> A municipality or public authority may violate "equal protection rights . . . [through] the gross abuse of power, invidious discrimination, or fundamentally unfair procedures."<sup>30</sup> When two or more municipalities decide to turn over their planning authority to a consolidated board, the board's subsequent actions may violate the Equal Protection Clause because the potential for palpably arbitrary rulings<sup>31</sup> may not be cured by the electoral process.<sup>32</sup>

Consolidated planning may violate the Equal Protection Clause in two ways. First, consolidated planning boards may violate the "one person, one vote" principle because of the inherent lack of proportional representation on consolidated planning boards.<sup>33</sup> Second, equal protection may also be denied because the citizens in each of the municipalities that have formed the joint planning board are denied the right to participate in the selection process of the board members from the other municipality.<sup>34</sup> Fundamentally, a consolidated planning board makes decisions affecting the use of land in both communities. The citizens of each community affected by the joint planning board must have an equal say in its composition. Anything less may create a constitutional infirmity in the statute.

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29. See *Gruen v. County of Suffolk*, 187 A.D.2d 560, 563, 590 N.Y.S.2d 217, 219-20 (2d Dep't 1992). See also *Margolis v. New York City Transit Authority*, 157 A.D.2d 238, 240-41, 555 N.Y.S.2d 711, 712-13 (1st Dep't 1990); *In re Cooke v. Bd. of Ed. of the Lawrence School Dist.*, 528 N.Y.S.2d 140, 142 (N.Y. App. Div. 1988).

30. *Dean Tarry Corp. v. Friedlander*, 650 F. Supp. 1544, 1552 (S.D.N.Y. 1987), *aff'd*, 826 F.2d 210 (2d Cir. 1987).

31. 20 N.Y. JUR.2D, Constitutional Law § 347 (1982). See also *Nelson v. Los Angeles County*, 362 U.S. 1, 8 (1960); *Harman v. Bd. of Ed.*, 300 N.Y. 21, 31, 88 N.E.2d 351, 355, *reh'g denied*, 300 N.Y. 644, 90 N.E.2d 297 (1949); *Lapchak v. Baker*, 298 N.Y. 89, 95, 80 N.E.2d 751, 754 (1948); *People v. Arlen Service Stations, Inc.*, 284 N.Y. 340, 343-44, 31 N.E.2d 184, 185 (1940).

32. A denial of voting rights through the implementation of a consolidated planning board can occur two ways. Part A of this article describes how equal protection can be denied through a violation of the principle of "one person, one vote." Part B speaks in terms of the inherent lack of proportional representation in the composition of joint planning boards.

33. See discussion *infra* part II-A.

34. See discussion *infra* part II-B.



A. *The Circumvention of the "One Person, One Vote" Principle: Morris and its Aftermath*

The members of a joint planning board would undoubtedly be appointed by their respective town supervisors or town boards. This effectively disenfranchises the citizens of all municipalities involved in the intermunicipal agreement by not complying with the "one person, one vote" doctrine.<sup>35</sup> In *Board of Estimate of City of New York v. Morris*,<sup>36</sup> the United States Supreme Court examined the important doctrine of "one person, one vote."<sup>37</sup> In *Morris*, the City of New York had created a Board of Estimate consisting of three members elected citywide, plus the elected presidents of New York City's five boroughs. Obviously, the five boroughs differed greatly in the size of their electorates so that there was unequal representation on the Board. The Court held that this deviation from the Equal Protection Clause of the Fourteenth Amendment was per se unconstitutional, stating that the equal protection guarantee of one person, one vote "extends not only to congressional district plans . . . but also to local government apportionment."<sup>38</sup>

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35. While concededly the "one man, one vote" principle has no relevancy to appointed offices (see *Sailors v. Bd. of Ed. of the City of Kent*, 387 U.S. 105 (1967); see also *Hadley v. Jr. College District*, 397 U.S. 50 (1970); *Fumarolo v. Chicago Bd. of Ed.*, 566 N.E.2d 1283 (Ill. 1990)), it is also true that a state may not manipulate its political subdivisions so as to defeat a federally protected right. *Sailors*, 387 U.S. at 108. Therefore, citizens are not denied equal representation because the appointment process of the joint planning board members is constitutionally infirm. Rather, equal protection is denied when the electorates of foreign municipalities through the election of their own town boards and supervisors (which in turn have the exclusive right to appoint these joint planning board representatives) have an equal or greater right to affect land use and stifle development in land outside the boundaries of their own municipalities. This encroachment on property rights would be constitutionally impermissible. See *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977) (holding that though Contract Clause does not require states "to adhere to a contract that surrenders an essential attribute of its sovereignty," states cannot partially repudiate financial obligation without showing repeal was reasonable and necessary to serve an important state purpose). See also *Hades v. Axelrod*, 70 N.Y.2d 364, 515 N.E.2d 612, 520 N.Y.S.2d 933 (1987) (noting the unconstitutionality of deprivation of vested property rights); *Fred F. Fresh Investing Co., Inc. v. City of N.Y.*, 39 N.Y.2d 687, 350 N.E.2d 381, 385 N.Y.S.2d 5, cert. denied, 429 U.S. 990 (1976) (noting that zoning violates Due Process if state deprives individual of property rights in one lot and permits transfer of those development rights to another lot).

36. 489 U.S. 688 (1989).

37. *Id.* at 692.

38. *Id.* (citations omitted).

The composition of the Board of Estimate is analogous to that of a joint planning board, the only difference being that a planning board's members may receive their offices through appointment rather than through election.<sup>39</sup> A joint planning board may not be representative of the municipalities it seeks to regulate. The problem lies in the fact that citizens in community "A" are unable to elect the town supervisors or town boards who appoint members to these joint boards from other communities "B", "C" or "D". These elected officials, through the appointment process, ultimately determine land use policies in their regions.<sup>40</sup> Since they only have to answer to their particular constituency, the town boards or supervisors are effectively insulated from the democratic process.<sup>41</sup> In *Morris*, Justice White reaffirmed the notion that the right to vote is a fundamental right enjoyed by all citizens and, as such, the weight of one's vote should not be lessened:

The personal right to vote is a value in itself, and a citizen is, without more and without mathematically calculating his power to determine the outcome of an election, shortchanged if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two; or to put it another way, if he may vote for one representative and the voters in another district half the size also elect one representative.<sup>42</sup>

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39. The only reference to the method of creation of a consolidated planning board appears in Subdivision 4(a) which states:

In addition to any powers granted to municipalities to contract with each other to undertake joint, cooperative agreements any municipality may: (a) create a consolidated planning board which may replace individual planning boards, if any, which consolidated planning board shall have the powers and duties as shall be determined by such agreement.

N.Y. GEN. MUN. LAW § 119-u(4)(a) (McKinney Supp. 1995).

40. See *Cunningham v. Municipality of Metro. Seattle*, 751 F. Supp. 885, 888 (W.D. Wash. 1990) (holding that whether elected bodies serve an "administrative" or "legislative" function is immaterial; municipalities must still meet requirements of "one person, one vote.").

41. See *Northampton County Drainage Dist. Number One v. Bailey*, 392 S.E.2d 352 (N.C. 1990) (holding that the right to vote on equal terms is a fundamental right for purposes of equal protection and strict scrutiny was appropriate in determining whether equal protection was denied because residents of county who owned land in drainage district could not vote for clerk of superior court in another county who appointed drainage district commissioners).

42. *Morris*, 489 U.S. at 698.

The situation inherent in the concept of a consolidated planning board is not too far off from this proposition. Through the election of their own officials, citizens of a municipality with a smaller population could have as much power to determine the planning policies of a municipality with a larger population. Because there is the danger that these citizens of the larger community will be denied equal voting power to vote for the officials who appoint the joint planning board members, joint planning boards violate the "one person, one vote" principle. In addition to the violation of the "one person, one vote" principle, a joint planning board may deny a municipality and its citizens proportional representation on the board. In *Morris*, Justice White reiterated the importance of proportional representation. *Morris* held that each citizen has the inalienable right to participate in the political processes of the legislative bodies of which he or she may be a constituent:

[T]he Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.<sup>43</sup>

It follows that a municipality that chooses to involve itself in a joint planning board may deny its citizens equal protection of the law, because citizens of the municipalities may not be proportionally represented on the board. For example, if Town A has only 1000 citizens while Town B has 2000 citizens, the citizens of Town B are denied equal representation on the joint board where an equal number of board members are appointed from each town.<sup>44</sup> This is constitutionally impermissible.<sup>45</sup>

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43. *Id.* at 693 (quoting *Hadley v. Junior College Dist. of Metro. Kansas City*, 397 U.S. 50 (1970)).

44. It must also be noted that there is no limit to the number of municipalities allowed to compose a joint planning board. Section 284(1) of the Town Law provides in relevant part: "express statutory authorization for cities, towns and villages to enter into agreements to undertake comprehensive planning and land use regulation with each other or one for the other. . . ." N.Y. TOWN LAW § 284(1) (McKinney Supp. 1994). It goes without saying that the more municipalities compose a joint planning board, the percentage of representation decreases accordingly.

45. See *Board of Estimate of N.Y. v. Morris*, 489 U.S. 688 (1989). See also U.S. CONST. amend. XIV, § 1; *In re Bruno v. New York State Bd. of Elections*, 208

In the creation of a joint planning board, citizens are denied equal voting power with their vote for the town boards or municipal supervisors, who appoint the officers of the joint planning board. In addition, in some cases they will not even be proportionally represented on the board. When there is equal representation between two municipalities on a joint planning board, "the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts."<sup>46</sup> When conflicts of interest arise between the municipalities, arbitrary and discriminatory decisions are sure to follow. This discrimination is even more repulsive to the Constitution under the present statutes since joint planning boards have plenary decision-making power.

Moreover, even where the formation of a joint planning board gives proportional representation to the citizens of the municipalities involved, the larger municipality would have more voting power on the board itself. As a result, it could dominate the joint planning board so that land use in the smaller municipality could be determined by the agenda of the larger one.<sup>47</sup> Since this "catch-22" is inherent in the concept of the joint planning board, there may be no way to implement a joint planning board which is not subject to constitutional attack.

B. *The Absence of a Region-Wide Election for All the Members of the Consolidated Planning Board Would Constitute a Denial of Equal Protection*

The New York State Constitution requires that "[e]very citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the

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A.D.2d 877, 878, 618 N.Y.S.2d 75, 77 (2d Dep't 1994) (holding that number of delegates to a Judicial Convention did not comply with proportional representation as required by N.Y. ELECTION LAW § 6-124 (McKinney 1978)).

46. *Morris*, 489 U.S. at 694.

47. While "weighted voting" has been held not to violate the Constitution (*see Curcio v. Boyle*, 142 Misc. 2d 1030, 542 N.Y.S.2d 1005 (Sup. Ct. Nassau County 1989)), if a system of weighted voting is implemented by a joint planning board, the potential for abuse is obvious: a minority municipality's voting power may be so diluted that it could have no real say in the regulation of land within its own territorial boundaries.

vote of the people . . . .”<sup>48</sup> The legislature has disenfranchised the citizens of all cities, towns and villages associated with joint planning boards. There is no democratic check on appointed officials from another municipality. Article IX section 1(b) of the New York State Constitution deals explicitly with this situation: “All officers of every local government whose election or appointment is not provided for by this constitution shall be elected by the people of the local government, or of some division thereof, or appointed by such officers of the local government as may be provided by law.”<sup>49</sup> The joint planning board conflicts with this fundamental constitutional precept.

Section 284 of the Town Law, section 7-741 of the Village Law, and section 20-g of the General City Law violate this so-called “[b]ill of rights for local governments”<sup>50</sup> since members of a joint planning board are appointed by unelected, non-officers of the local government, i.e., town boards and supervisors from other municipalities. The purpose of this constitutional provision was “to secure to the people of the cities, towns and villages of the state the right to have local offices administered by officers selected by them.”<sup>51</sup> When two or more municipalities enter into an agreement to create a joint planning board, the municipalities take away their citizens’ right to have their local offices administered by local officers that they have selected.

In addition, section 271 of the Town Law expressly authorizes, pursuant to Article IX of the constitution, “the town board of each town” to create the town’s planning board.<sup>52</sup> At least one half of the members of a joint planning board, however, are appointed by the town board of other towns. This also may insulate these members from the democratic process.<sup>53</sup>

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48. N.Y. CONST. art. II, § 1.

49. N.Y. CONST. art. IX, § 1, cl. b.

50. N.Y. CONST. art. IX, § 1.

51. *In re Alvaro v. Baar*, 67 Misc. 2d 489, 491, 324 N.Y.S.2d 588, 590 (Sup. Ct. Albany County 1971). *See also* *Lanza v. Wagner*, 11 N.Y.2d 317, 325, 183 N.E.2d 670, 674, 229 N.Y.S.2d 380, 386 (N.Y. 1962), *cert. denied*, 371 U.S. 901 (1962); *People v. Pelham*, 215 N.Y. 374, 375, 109 N.E. 513, 514 (N.Y. 1915) (interpreting Article 10 §2, now Article 9 §1); *People ex rel. Metro. St. Ry. Co. v. State Bd. of Tax Comm’rs*, 174 N.Y. 417, 434, 67 N.E. 69, 72 (N.Y. 1903), *aff’d*, 199 U.S. 1 (1904).

52. N.Y. TOWN LAW § 271(1) (McKinney Supp. 1994); N.Y. CONST. art. IX.

53. *See, e.g., Ryan v. Albany County Democratic Comm.*, 68 A.D.2d 1014, 414 N.Y.S.2d 936 (3d Dep’t 1979), *modified on appeal*, 47 N.Y.2d 963, 393 N.E.2d 1043,

Therefore, it is constitutionally required by Article IX and statutorily mandated by section 271 of the Town Law that planning board members be appointed by the democratically elected town boards of each town. Since joint planning boards will always consist of members who are not representative of the constituencies they seek to regulate, they are per se unconstitutional. Therefore, joint planning boards inherently deny citizens notice and an opportunity to be heard in a process that ultimately affects private property rights.

## II. The Creation of a Joint Planning Board is Per Se Unconstitutional Because It Violates Due Process Rights

In addition to a denial of equal protection rights, joint planning boards effectively deny these citizens their due process rights. It is a well known constitutional principle that no person shall be deprived of life, liberty or property without due process of law.<sup>54</sup>

It is fundamental that the government cannot bargain away the power to regulate property.<sup>55</sup> The right to exercise the police power cannot be alienated, surrendered or abridged by the legislature by any grant or contract. This limitation exists because police power is the very power by which the government protects the rights it was designed to protect.<sup>56</sup> If the requirements of due process must be met when the government attempts to interfere with individual property rights, then joint planning boards present due process problems in three ways. First, joint planning boards violate the doctrine of home rule by usurping police power from an autonomous municipality with

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419 N.Y.S.2d 971 (1979) (holding that the power to appoint election commissioners must be vested in the local legislatures).

54. See U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; N.Y. CONST. art. 1, § 6.

55. *United States Trust Co. v. New Jersey* 431 U.S. 1, 23 (1976). See *American Consumer Industries, Inc. v. City of New York*, 28 A.D.2d 38, 42, 281 N.Y.S.2d 467, 473 (1st Dep't 1967). See also *People v. Brooklyn Garden Apartments, Inc.*, 15 N.Y.S.2d 890, 258 A.D. 151 (1st Dep't 1939), *rev'd on other grounds*, 283 N.Y. 373, 28 N.E.2d 877 (N.Y. 1940) ("In so far as the police power means the right of the Legislature to protect the health, general welfare and safety of the citizens such right may not be contracted away.").

56. See *People ex rel. New York Elec. Lines Co. v. Squire*, 107 N.Y. 593, 606, 14 N.E. 820, 824 (N.Y. 1888), *aff'd*, 145 U.S. 175 (1892).

the placement of that power in an unelected board.<sup>57</sup> Second, the New York statutes deny due process because they constitute an improper delegation of police power, since the legislature set no guidelines or rules which a joint planning board must follow.<sup>58</sup> Finally, if it is found that an enabling statute which authorizes the creation of a joint planning board is not logically related to the promotion of the welfare of the community, a denial of due process results.<sup>59</sup>

A. *Joint Planning Boards Are Inconsistent with the Provisions of the New York State Constitution Guaranteeing Due Process Because They Undermine the Doctrine of Home Rule*

The United States Supreme Court held in *Euclid* that:

[T]he question whether the power exists to forbid the erection of a building of a particular kind or of a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality.<sup>60</sup>

The use of a joint planning board may seriously contradict the doctrine of home rule when its members make planning decisions based on the needs of the communities from which they were appointed, not on the needs of the individual community affected. Accordingly, a joint planning board may undermine the doctrine of home rule.

It has been suggested that local zoning and planning autonomy seriously hinders regional efforts to deal with contemporary problems and ignores questions of broader public

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57. See discussion *infra* part II-A.

58. See discussion *infra* part II-B.

59. See discussion *infra* part II-C.

60. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). The practical effect of the creation of a joint planning board is that it may deny localities the opportunity to determine their own comprehensive plans on a case by case basis. That is, if a joint planning board becomes so large as to include representatives from numerous localities, the board may deal solely in the abstract: it will base its decisions on what it finds is best for the region, not for the individual citizen or for the needs of any one particular locality.

interest.<sup>61</sup> For example, the New York Court of Appeals stated in *In re Golden v. Planning Board of the Town of Ramapo*:<sup>62</sup>

Experience, over the last quarter century, however, with greater technological integration and drastic shifts in population distribution has pointed up serious defects and community autonomy in land use controls has come under increasing attack by legal commentators, and students of urban problems alike, because of its pronounced insularism and its correlative role in producing distortions in metropolitan growth patterns, and perhaps more importantly, in crippling efforts toward regional and State-wide problem solving, be it pollution, decent housing, or public transportation . . . .<sup>63</sup>

Although commentators have suggested that the power of a municipality to enact planning regulations should be deferred to regional or even state-wide planning boards, the home rule is exposed.<sup>64</sup>

61. 1 ROHAN, *supra* note 3, § 4.02(3)(c).

62. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *appeal dismissed*, 409 U.S. 1003 (1972). The court upheld a statute that required time restrictions on development because the restrictions were not absolute in duration. *Id.* at 382, 285 N.E.2d at 304, 334 N.Y.S.2d at 155. Nevertheless, the court refused to undermine Ramapo's authority to enact its own regulation by taking into account the effect that the timing restriction would have on the entire region's growth. The court stated:

Recognition of communal and regional interdependence, in turn, has resulted in proposals for schemes of regional and State-wide planning, in the hope that decisions would then correspond roughly to their level of impact. Yet, as salutary as such proposals may be, the power to zone under current law is vested in local municipalities, and we are constrained to resolve the issues accordingly.

*Id.* at 375, 285 N.E.2d at 300, 334 N.Y.S.2d at 149 (footnote omitted) (citations omitted).

63. *Id.* at 374, 285 N.E.2d at 299, 334 N.Y.S.2d at 149 (citations omitted).

64. See, e.g., Robert H. Frielich and John W. Ragsdale, Jr., *Timing and Sequential Controls—The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region*, 58 MINN. L. REV. 1009, 1024-28 (1974) (exploring the urgent need for growth control in the Minneapolis-St. Paul region and analyzing the constitutional problems of regulation and the methods, plans and techniques which may be used to implement a program similar to that upheld in *In re Golden v. Planning Bd. of the Town of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972)). This article notes that a joint planning board may usurp home rule only when there is a pressing regional need to do so.

Traditional approaches in land use control have concentrated decision-making power at the local or municipal level and, perhaps secondarily, at the county level. Only rarely has the power to control land use been exer-



Article IX section 2 of the New York State Constitution sets forth the powers and duties of the legislature as well as the home rule powers of local governments. The general purpose of the section is stated in Subdivision (a): "The legislature shall provide for the creation and organization of local governments in such manner as shall secure to them the rights, powers, privileges and immunities granted to them by this constitution."<sup>65</sup> Just as the Fourteenth Amendment to the United States Constitution guarantees the privileges and immunities enjoyed by the citizens of the several states,<sup>66</sup> the home rule provisions of the New York State Constitution<sup>67</sup> guarantee certain rights to the several municipalities within the state. One right is the election of officials without interference from any other municipality.<sup>68</sup> The practical effect of joint planning boards is to divest this autonomy from the municipalities.

Section 10 of the Municipal Home Rule Law is a statutory limit on the amount of power that may be divested from any given municipality. Section 10 states:

1. In addition to powers granted in the constitution, the statute of local governments or in any other law, (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law relating to its property, affairs or government . . . .<sup>69</sup>

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cised by the state or a regional unit . . . . It is becoming increasingly apparent that there are many advantages to control at a higher level over land use problems. A number of crucial land use problems are not local in either effect or origin, and the scope of effective regulation must be commensurate with them. It is proving impossible to successfully regulate regional problems with a fragmented network of controls.

*Id.* at 1024-25 (footnotes omitted). Under the New York statutes, however, a consolidated planning board may act unilaterally in decisions that are purely local in nature since they may serve as replacements for individual planning boards. See N.Y. GEN. CITY LAW § 20-g(4)(g) (McKinney 1996); N.Y. VILLAGE LAW § 7-741(4)(b) (McKinney 1996); N.Y. TOWN LAW § 284(4)(b) (McKinney 1996).

65. N.Y. CONST. art. IX, § 2(a).

66. U.S. CONST. amend. XIV, § 1.

67. N.Y. CONST. art. IX, § 2(b)-(e).

68. See N.Y. CONST. art. IX, § 1(b). "All officers of every local government whose election or appointment is not provided for by this constitution shall be elected by the people of the local government or by some division thereof, or appointed by such officers of the local government as may be provided by law." *Id.*

69. N.Y. MUN. HOME RULE LAW § 10(1)(i) (McKinney Supp. 1994).

Under this provision, the delegation of power to a joint planning board, which is violative of both the United States and the New York State Constitutions, disrupts the doctrine of home rule.<sup>70</sup> Joint planning boards deny due process in that they unconstitutionally destroy a municipality's right to choose its own officers and regulate its own land without undue interference from any other governmental entity.<sup>71</sup>

*People v. Village of Pelham*<sup>72</sup> illustrates the intent of Article IX. The Court of Appeals held in *Pelham* that the Westchester County Tax Act<sup>73</sup> was inconsistent with the doctrine of Home Rule, which protected the autonomy of the towns and villages, even before it was codified by the various versions of the Constitution.<sup>74</sup> The Court, referring to the Home Rule doctrine, stated that:

Faithfully observed, and effect given to it in its spirit as well as in its letter, it effectually secures to each of the governmental divisions of the State the right of choosing or appointing its own local officers, without let or hindrance from the State government, and none can be deprived of the rights and franchises thus guaranteed to all. The theory of the Constitution is, that the several counties, cities, towns and villages are, of right, entitled to choose whom they will have to rule over them; and that this right cannot be taken from them and the electors and inhabitants disenfranchised by any act of the legislature, or of any or all of the departments of the State government combined.<sup>75</sup>

The *Pelham* court's reasoning is still relevant. The Constitution protects the principle that local rule may not be usurped by any act of the State Legislature.<sup>76</sup> The creation of joint planning boards is per se unconstitutional because these boards divest

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70. U.S. CONST. amend. XIV; U.S. CONST. amend V; N.Y. CONST. art. II, § 1; N.Y. CONST. art. IX.

71. See 8 Op. N.Y. Comp. 50 (1984) (holding that while a town and a village within the town may enact the same substantive zoning regulations, a town and a village may not extend the territorial application and effect of a town zoning ordinance or local law into the village pursuant to an agreement under General Municipal Law article 5-G).

72. 215 N.Y. 374, 109 N.E. 513 (N.Y. 1915).

73. 1914 N.Y. Laws 510.

74. 215 N.Y. at 379-89, 109 N.E. at 514-16.

75. *Id.* at 515 (quoting *People ex rel. Bolton v. Albertson*, 55 N.Y. 50, 56 (1873)).

76. 215 N.Y. at 387-89, 109 N.E. at 517 (1915).

the local autonomy of municipalities to regulate property located within their boundaries by fracturing the decision-making authority among other foreign political subdivisions which may, or may not, have a stake in each decision.<sup>77</sup>

*B. The Aforementioned Provisions of the Town Law, Village Law and General City Law Deny Due Process Through the Improper Delegation of Discretionary Power to the Municipalities By Not Setting Specific Guidelines, Rules or Regulations which the Joint Planning Boards Must Follow*

It is well settled "that the lawmaking authority of a municipal corporation, a political subdivision of the State, can be exercised only to the extent that it has been delegated by the State."<sup>78</sup> Furthermore, a municipal corporation may not delegate to its own agencies powers that it does not enjoy itself.<sup>79</sup> The issue in interpreting sections 284 of the Town Law, 7-741 of the Village Law, and 20-g of the General City Law is the amount of power an entirely ambiguous statute can delegate.<sup>80</sup>

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77. The reasoning in *Pelham* is still followed today. See, e.g., *Matter of Roth v. Cuevas*, 158 Misc. 2d 238, 242, 603 N.Y.S.2d 962, 965 (Sup. Ct. New York County 1993), *aff'd*, 197 A.D.2d 369, 603 N.Y.S.2d 736 (1st Dep't 1993), *aff'd*, 82 N.Y.2d 791, 624 N.E.2d 689, 604 N.Y.S.2d 551 (1993). "The purpose of home rule provisions of the Constitution is to secure the right of cities to choose their officers without hindrance from the State and to preserve their privilege of continuing to administer those powers of self-government which they enjoyed before the adoption of the Constitution . . ." *Id.* Other states have also followed the New York court. See, e.g., *Amos v. Mathews*, 126 So. 308, 321-22 (Fla. 1930) (holding that even though a county is a mere agency of the state having no inherent powers, its existence as a local government is recognized by the Constitution); *State ex rel. Tax Comm'n v. Redd*, 6 P.2d 619, 622-23 (Wash. 1932) (holding that the legislature cannot take away the right of self-government from the citizens of municipal corporations).

78. See *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 376, 546 N.E.2d 920, 921, 547 N.Y.S.2d 627, 628 (1989).

79. See, e.g., *Webster Assoc. v. Town of Webster*, 112 Misc. 2d 396, 405, 447 N.Y.S.2d 401, 407 (Sup. Ct. Monroe County 1981), *aff'd*, 85 A.D.2d 882, 446 N.Y.S.2d 955 (4th Dep't 1981), *rev'd on other grounds*, 59 N.Y.2d 220, 451 N.E.2d 189, 464 N.Y.S.2d 431 (1983). "The authority of a town to enact zoning and planning legislation is purely statutory, and a town may not delegate that power beyond the measure granted by the Legislature." *Id.*

80. See, e.g., *Foss v. City of Rochester*, 104 A.D.2d 99, 103, 481 N.Y.S.2d 191, 194 (4th Dep't 1984), *rearg. ordered*, 64 N.Y.2d 993, 478 N.E.2d 203, 489 N.Y.S.2d 62, *aff'd as modified*, 65 N.Y.2d 247, 480 N.E.2d 717, 491 N.Y.S.2d 128 (1985) (holding that due process requires at least a reasonable degree of certainty because

These statutes offer no guidance regarding the powers or functions of joint planning boards.<sup>81</sup> They simply read:

In addition to any other general or special powers vested in a town to prepare a comprehensive plan and enact and administer land use regulations, by local law or ordinance, rule or regulation, each town is hereby authorized to enter into, amend, cancel and terminate agreements with any other municipality or municipalities to undertake *all* or a portion of such *powers, functions* and *duties*.<sup>82</sup>

The statutes' definition of "powers," "functions" and "duties" is rather vague: it seems that the police power to enact planning and zoning regulations may now be delegated to a joint planning board. Invariably this includes final decision-making power.

In addition, the statutes define "intermunicipal agreements" in subdivision (4) as allowing municipalities to form a joint planning board.<sup>83</sup> Section 3(a) of McKinney's New York

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citizens may be denied notice and an opportunity to be heard by being forced to guess at the meaning of the statutory terms).

81. See N.Y. GEN. CITY LAW § 20-g(5)(a) (McKinney Supp. 1994); N.Y. TOWN LAW § 284(5)(a) (McKinney Supp. 1994); N.Y. VILLAGE LAW § 7-741(5)(a) (McKinney Supp. 1994). The language of Subdivision 5(a) is a prime example of this vagueness: "5. Special considerations. (a) Making joint agreements. Any agreement made pursuant to the provisions of this section may contain provisions as the parties deem to be appropriate . . ." *Id.* Absent clear legislative guidance, this standard becomes wholly subjective and, therefore, an unconstitutional delegation of legislative power.

82. N.Y. TOWN LAW § 284(2)(a) (McKinney Supp. 1994); N.Y. VILLAGE LAW § 7-741(2)(a) (McKinney Supp. 1994); N.Y. GEN. CITY LAW § 20-g(2)(a) (McKinney Supp. 1994) (emphasis added).

83. N.Y. GEN. CITY LAW § 20-g(4) (McKinney Supp. 1994); N.Y. TOWN LAW § 284(4) (McKinney Supp. 1994); N.Y. VILLAGE LAW § 7-741(4) (McKinney Supp. 1994). Subdivision (2)(b) defines certain "functions"; however, the statute reads: "Such functions may include *but are not limited to* . . ." N.Y. GEN. CITY LAW § 20-g(2)(b) (McKinney Supp. 1994); N.Y. TOWN LAW § 284(2)(b) (McKinney Supp. 1994); N.Y. VILLAGE LAW § 7-741(2)(b) (McKinney Supp. 1994) (emphasis added). In addition, the language of Subdivision (4)(a) greatly expands the definition of "intermunicipal agreement": "[W]hich consolidated planning board shall have the powers and duties as shall be determined by such agreement." In other words, the legislature has left the authority to determine the scope of power afforded to their joint planning boards up to the discretion of each municipality. This is therefore an improper delegation of legislative power and a potential denial of due process. See, e.g., *Auerbach v. Kinley*, 594 F. Supp. 1503, 1511 (N.D.N.Y. 1984), *rev'd in part sub nom.* *Auerbach v. Rettaliata*, 765 F.2d 350 (2d Cir. 1985) (holding that "statutes which fail to provide [sufficiently precise] standards are unconstitutional

Statutes provides in relevant part: "It is said that if a law is perfect, final, and decisive in all its parts, and the discretion given only relates to its execution, it is a proper delegation of lawmaking power, otherwise it is not."<sup>84</sup> In addition, state law requires that: "[I]n conferring discretion upon administrative officers or boards, the statute must define the limits of that discretion and fix rules or standards to govern its exercise."<sup>85</sup>

The power conferred on planning boards and administrative bodies of review must be specific. It must have guidelines.<sup>86</sup> The limits of administrative discretion must be clearly articulated by the formulation of guidelines for the board or agency determinations.<sup>87</sup>

A comparison of sections 274-a and 284 of the Town Law demonstrates how section 284 constitutes an improper delegation of power to the municipalities. Section 274-a of the Town Law gives towns a measure of discretion in the authorization of their planning boards to approve site plans and certain uses.<sup>88</sup> Nevertheless, section 274-a defines the limits of these potential functions. Subdivision (1)(a) is a relevant example:

Planning board approval of site plans. The town board may, as part of a zoning ordinance . . . authorize the planning board to review and approve, approve with modifications or disapprove site plans . . . . Such ordinance or local law shall specify the uses for which such approval shall be required and the elements to be included in such plans submitted for approval; such elements may include, where appropriate, those relating to parking, means of access, screening, signs, landscaping, . . . and such other elements

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because they permit local officials unlimited discretion in the area of constitutionally protected rights and invite arbitrary and discriminatory inferences . . . .").

84. N.Y. STATUTES LAW § 3(a) (McKinney 1971).

85. N.Y. STATUTES LAW § 3(d) (McKinney 1971) (governing guideposts and standards in the delegation of legislative powers). See also *People ex rel. Tipaldo v. Morehead*, 270 N.Y. 233, 200 N.E. 799 (1936), cert. granted *Morehead v. People ex rel. Tipaldo*, 297 U.S. 702, aff'd, 298 U.S. 587, reh'g denied, 299 U.S. 619 (1936) (holding minimum wage law for women and minors unconstitutional as an unwarranted delegation of legislative power to an administrative board as applied to adult women).

86. *Olp v. Town of Brighton*, 173 Misc. 1079, 1082, 19 N.Y.S.2d 546, 550 (Sup. Ct. Monroe County 1940).

87. *Id.*

88. N.Y. TOWN LAW § 274-a (McKinney Supp. 1996).

as may reasonably be related to the health, safety and general welfare of the community.<sup>89</sup>

The words "such elements may include" are not followed by the vague disclaimer "but are not limited to." Concededly, the legislature still used the arguably vague phrase "may include." However, the inclusions listed in the statute are examples of common issues relating to a site plan review and are reasonably related to the health, safety and general welfare of the community. In addition, a strict reading of this statute<sup>90</sup> shows that the enumerated list of regulated uses serves as more than a mere guideline which a planning board should follow. By using the words "may include," the legislature arguably intended to grant specific permission in the regulation of a particular list of enumerated elements. "May" is therefore seen as permissive in its most narrow sense.

Sections 284, 7-741, and 20-g, however, do use the qualification "but are not limited to" after the phrase "may include."<sup>91</sup> The statutes do not list any of the class of elements as set forth in section 274-a. Significantly, there is no mention of the health, safety or general welfare of the community.<sup>92</sup> Therefore no limits are set. No standards or guidelines for the exercise of legislative discretion is set forth. This constitutes an improper delegation of legislative authority.<sup>93</sup>

It is no surprise that the concise and specific Section 274-a was held to be a proper delegation in *Webster Associates v. Town of Webster*.<sup>94</sup> While the *Webster* court held that section 274-a properly delegated final decision-making power to the planning board, the court acknowledged that if the wording in the statute had given *absolute* power to the planning board, it would have been invalid.

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89. N.Y. TOWN LAW § 274-a(1)(a) (McKinney 1994); 1976 N.Y. Laws 272, § 2.

90. See discussion *infra* part IV (discussing that statutes in derogation of the common law must receive a strict construction).

91. N.Y. GEN. CITY LAW §20-g(2)(b); N.Y. TOWN LAW § 284(2)(b); N.Y. VILLAGE LAW §7-741(2)(b).

92. See *infra* part II.C.

93. See 25 N.Y. JUR. 2D, *Counties, Towns, and Municipal Corporations* § 167 (1982).

94. 112 Misc. 2d 396, 447 N.Y.S.2d 401 (Sup. Ct. Monroe County), *aff'd*, 85 A.D.2d 882, 446 N.Y.S.2d 955 (4th Dep't 1981), *rev'd on other grounds*, 59 N.Y.2d 220, 451 N.E.2d 189, 464 N.Y.S.2d 431 (1983).

Moreover, even if the ordinance were to make planning board approval of a preliminary development plan an absolute prerequisite to further action by the town board, there would be a serious question as to its validity. The authority of a town to enact zoning and planning legislation is purely statutory, and a town may not delegate that power beyond the measure granted by the Legislature . . . . While section 274-a of the Town Law permits a town board to delegate to its planning board the approval of site plans, it does not permit the abdication of its legislative authority to determine the appropriateness of proposed rezoning . . . .<sup>95</sup>

In the absence of definition, section 284 may not delegate all legislative authority to the planning board. A joint planning board may now usurp all authority from the towns boards. Because the members of the joint planning board are insulated from the democratic process, no check on their power exists. Further, a gross denial of due process arises from the statutes' ambiguity, i.e., they set no limit with regard to the decision-making authority of the joint planning boards.<sup>96</sup>

C. *The Aforementioned Provisions of the Town Law, Village Law and General City Law Constitute a Denial of Due Process in that They Do Not Relate to the Promotion of Health, Safety and General Welfare of the Communities*

It is well settled that the New York Legislature may delegate broad police powers to the municipalities. There must, however, "be some fair, just, and reasonable connection between the exercise of the police power and the promotion of the health,

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95. *Webster Assoc.*, 112 Misc. 2d at 405, 447 N.Y.S.2d at 407.

96. *See also Noyes v. Erie & Wyoming Farmers Coop. Corp.*, 281 N.Y. 187, 22 N.E.2d 334 (1939) (holding that there was no invalid delegation of legislative power since the statute in question, which authorized a commissioner to fix milk prices, specifically provided the manner in which the commissioner must act and the matters he must consider as to the basis for his determination); *Janiak v. Town of Grenville*, 203 A.D.2d 329, 610 N.Y.S.2d 286 (2d Dep't 1994); *Timber Point Homes, Inc. v. County of Suffolk*, 155 A.D.2d 671, 548 N.Y.S.2d 250 (2d Dep't 1989) (holding that a regulation permitting county health commissioner to grant variance was impermissibly vague and violated due process by giving unfettered discretion); *Atlantic-Inland, Inc. v. Town of Union*, 126 Misc. 2d 509, 483 N.Y.S.2d 612 (Sup. Ct. Broome County 1984) (holding ordinance constitutionally infirm in purporting to delegate the exercise of police powers of town and right to establish and collect fees for exercise of such power, and in failing to fix the standard of reasonableness, or any standard, for fees to be paid).

comfort, safety, and [general] welfare of society.”<sup>97</sup> Sections 284 of the Town Law, 7-741 of the Village Law, and 20-g of the General City Law state the legislative intent of increasing coordination and effectiveness of planning and land use regulation.<sup>98</sup> However, the statutes make no reference to the promotion of the health, safety, and welfare of the community.<sup>99</sup> As such, they improperly delegate police power to the municipalities by not requiring a reasonable connection to the promotion of health, safety and welfare. Absent this important check on police power, the potential for abuse is obvious: a joint planning board may make its decisions based solely on the whims of its members.

In *Fenster v. Leary*, the Court of Appeals quoted the astute observation of Judge Fuld:

The police power is “very broad and comprehensive” and in its exercise “the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other,” . . . . But, in order for an exercise of police power to be valid, there must be “some fair, just

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97. 20 N.Y. JUR. 2D, *Counties, Towns, and Municipal Corporations* § 217. See also *Fenster v. Leary*, 20 N.Y.2d 309, 314, 229 N.E.2d 426, 429 282 N.Y.S.2d 739, 743-44 (1967) (noting the requirement that there must be a reasonable connection between the police power “and the promotion of the health, comfort, safety, and welfare of society.” (quoting *People v. Bunis*, 9 N.Y.2d 1, 4, 172 N.E.2d 273, 274, 210 N.Y.S.2d 505, 507 (1961))); *People v. Pace*, 111 Misc. 2d 488, 490, 444 N.Y.S.2d 529, 531 (Sup. Ct. Kings County 1981) (holding that the state has a legitimate interest in supervising defendant’s business, which had been pervasively regulated, since there was a “reasonable connection” to the promotion of the health, safety, and welfare of the community); *Gannett Co. v. Rochester*, 69 Misc. 2d 619, 330 N.Y.S.2d 648 (Sup. Ct. Monroe County 1972) (invalidating ordinance that restricted the use of newspaper vending machines as not designed to promote the health, safety, or welfare of the community and any presumption of validity must be balanced by preferred place given to freedoms in democratic system of government); 1 *Rathkopf*, *supra* note 6, § 3.01(1) (“As a matter of ‘fundamental fairness,’ due process requires that legislative enactments be reasonably related to promoting some legitimate public purpose—defined to include health, safety, morals, or the general welfare. Ordinances which lack this ‘rational basis’ in fact or logic are held unconstitutional as arbitrary and unreasonable restraints on private rights.”).

98. N.Y. GEN. CITY LAW § 20-g(1) (McKinney Supp. 1994); N.Y. TOWN LAW § 284(1) (McKinney Supp. 1994); N.Y. VILLAGE LAW § 7-741(1) (McKinney Supp. 1994).

99. *Id.*



and reasonable connection" between it and the promotion of the health, comfort, safety and welfare of society.<sup>100</sup>

The pivotal issue is whether the New York State Legislature has conferred power to the municipalities (and whether the municipalities may in turn confer power to a joint planning board) on the ground that the public health, safety, or general welfare will be promoted through the creation of these cooperative boards.<sup>101</sup>

While a legitimate public purpose may be served without regard to the constitutional limitations of due process and equal protection, municipalities are not allowed to abuse the police power and hide behind a presumption of legality by vague references to alleged safety hazards.<sup>102</sup> There is no rational relationship between the creation of joint planning boards and the promotion of the health, safety and welfare of the several municipalities. There are no checks on the joint planning board, and there are no reasonable guideposts which it must follow. The deliberation of a joint planning board will cost the taxpayers and private property owners time and money in the development of their municipalities, and the conflicts of interest between the comprehensive plans of the several municipalities

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100. *Fenster*, 20 N.Y.2d at 314, 229 N.E.2d at 429, 282 N.Y.S.2d at 743-44 (quoting *People v. Bunis*, 9 N.Y.2d 1, 4, 172 N.E.2d 273, 274, 210 N.Y.S.2d 505, 507 (1961)). See also, *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1577 (S.D. Fla. 1992) (holding vagrancy statute unconstitutional as overbroad and violative of Fourteenth Amendment Due Process Clause).

101. See *Olp v. Town of Brighton*, 173 Misc. 1079, 1081, 19 N.Y.S.2d 546, 550 (Sup. Ct. Monroe County 1940), *aff'd*, 262 A.D. 944, 29 N.Y.S.2d 956 (4th Dep't 1941). In *Olp*, the New York Supreme Court, Monroe County, stated:

The pivotal issue in this proceeding is whether the town board as the legislative body of the town has conferred power on the planning board to grant or deny a permit for a gasoline station on the ground that the public health, safety, morals or general welfare will be promoted or obstructed and whether, if such power has been conferred, it is an improper delegation of legislative authority.

173 Misc. at 1081, 19 N.Y.S.2d at 550. If two or more towns confer unlimited power on a joint planning board, that delegation of power will be *ultra vires* and void. *Id.* Because the statutes permit this unhindered delegation of power, the floodgates of litigation may open.

102. 25 N.Y. JUR. 2D, *Counties, Towns, and Municipal Corporations*, § 220 (1982).

will cause disruption, confusion, and will ultimately lead to arbitrary and capricious decisions.<sup>103</sup>

In their article demonstrating the need for regional planning in the Minneapolis-St. Paul region, Freilich and Ragsdale set forth the three constitutionally permissible means by which a region-wide planning commission may augment its power.<sup>104</sup> First, the commission may influence patterns of growth through regional capital improvement plans and projects.<sup>105</sup> Second, it may enter into cooperation agreements with governmental entities in the region.<sup>106</sup> Last, it may attempt to use its powers of review over federal grants and loans to force compliance with the regional plan.<sup>107</sup> The authors note, however, that “[l]ocal governments must remain the essential link in the process, retaining decision-making powers at the implementation stage of the planning process.”<sup>108</sup> This limitation simply does not exist in the New York statutes. In short, there are other more rational means for the promotion of cooperation among the localities than through the creation of an entity which serves to obstruct rather than promote the health, welfare, and safety of the communities.<sup>109</sup>

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103. The legislature's intent in enacting 1992 N.Y. Laws 724 was to promote intergovernmental cooperation so as to preserve revenues, protect resources, and coordinate land regulation. See N.Y. GEN. CITY LAW § 20-g(1) (McKinney Supp. 1994); N.Y. TOWN LAW § 284(1) (McKinney Supp. 1994); N.Y. VILLAGE LAW § 7-741(1) (McKinney Supp. 1994). Nevertheless, all three of these intentions cannot come about through the use of a joint planning board. First, business will suffer because of the delays that will occur in development, so revenue will ultimately be lost. Second, there is no evidence that the use of a consolidated planning board will help to preserve natural resources. Last, the goal of uniform land regulation is illegitimate since it deprives the municipalities of the power to determine their own comprehensive plan which can only address the particular concerns of its constituents. It is no coincidence that nowhere in the language of the statutes is there a mention of health, safety, or welfare.

104. Freilich, *supra* note 64, at 1022-23.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 1023-24.

109. This is not to suggest that the statutes are merely subject to the “reasonably related” standard as set forth in *Lighthouse Shores, Inc. v. Town of Islip*, 41 N.Y.2d 7, 11-12, 359 N.E.2d 337, 341, 390 N.Y.S.2d 827, 830 (1976) (holding that a municipal ordinance may not be arbitrary and must be reasonably related, in this case, to the public purpose or protecting the environment). The court held, however, that if an ordinance was merely reasonably related to some “manifest evil,” then it will be struck down as unconstitutional. *Id.* at 11, 359 N.E.2d at 341, 390

### III. The Creation of a Joint Planning Board Will, In Effect, Constitute a De Facto Moratorium on Development Rights Which Will Rise to the Level of a De Facto Taking

“Eminent domain is the power of the sovereign to take [private] property for ‘public use’ without the owner’s consent.”<sup>110</sup> The United States Constitution provides that a sovereign may not take private property without paying just compensation to the individual landowner.<sup>111</sup> As a result, all states have enacted statutes which set forth formal appropriation procedures which must be followed so as to protect private property owners.<sup>112</sup> The Fifth Amendment does not prohibit the taking of private property; it merely requires that just compensation be paid if property is taken.<sup>113</sup>

A taking requiring just compensation may occur even when a sovereign does not use the statutorily required appropriation

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N.Y.S.2d at 830. *See also* *Town of Gardiner v. Stanley Orchards, Inc.*, 105 Misc. 2d 460, 432 N.Y.S.2d 335 (Sup. Ct. Ulster County 1980). Rather, because the statutes seek to abridge the vested rights of property owners through the denial of due process and equal protection of law without the constitutionally required justification that the statutes promote the health and welfare of the communities, the strictest scrutiny must apply. *See* U.S. CONST. amend. V. *See also* *Esler v. Walters*, 56 N.Y.2d 306, 310, 437 N.E.2d 1090, 1092, 452 N.Y.S.2d 333, 335 (1982) (stating that equal protection guarantee of Fourteenth Amendment places heavy burden on state to justify any departure from “one person, one vote” principle). Among some other more reasonable means to promote intermunicipal cooperation available to the legislature are specifying that joint planning boards can merely act in an advisory capacity and mandating annual county or regional conventions of town planning boards to discuss and compare comprehensive plans.

110. 1 Nichols’ ON EMINENT DOMAIN, § 1.11 (rev. 3d ed. 1995).

111. U.S. CONST. amend. V.

112. *See, e.g.*, *Seiler v. Intrastate Gathering Corp.*, 730 S.W.2d 133, 136-37 (Tex. 1987) (holding that eminent domain procedures must be strictly followed); *State ex rel. Mo. Highway and Transp. Comm’n v. Anderson*, 735 S.W.2d 350, 352 (Mo. 1987) (stating that two-step process for condemnation guarantees public early commencement of project while preserving to individual landowners the right to extensively and thoroughly litigate all issues relating to damages for taking); *Smith v. Penn. Cent. Corp.*, 499 N.E.2d 325 (Ohio 1985) (holding that in appropriation of real property, Director of Transportation has option to proceed under either of two eminent domain statutes).

113. U.S. CONST. amend. V. *See also* *Schertel v. Rex*, 764 F. Supp. 1002 (E.D. Pa. 1991); *Friel v. Triangle Oil Co.*, 543 A.2d 863, 867 (Md. 1988); *Palughi v. City of Mobile*, 526 So. 2d 1 (Ala. 1988), *cert. denied*, 488 U.S. 855 (1988) (stating “[p]rivate property may be condemned if it is being taken for a recognized public use, and the owner is compensated for his loss.”). *Id.* (citing *Nicrosi v. City of Montgomery*, 406 So. 2d 951 (Ala. Civ. App. 1981)).

proceeding.<sup>114</sup> Such taking of property without proper appropriation proceedings is known as a "de facto appropriation."<sup>115</sup> A de facto taking has occurred if there has been a "physical invasion of property or a direct legal restraint on its use."<sup>116</sup> If a statute affects the free use and enjoyment of one's real property or the power of disposition at the owner's will, a de facto taking has occurred.<sup>117</sup>

In *First English Lutheran Church v. The County of Los Angeles*,<sup>118</sup> the United States Supreme Court recognized that a municipal corporation may be required to compensate its citizens for a temporary de facto taking.<sup>119</sup> In response to the flooding of a canyon, the County of Los Angeles adopted an interim ordinance which prohibited the construction, reconstruction, placement, or enlargement of any building or structure located within the flood protection area.<sup>120</sup> Chief Justice Rehnquist held that "'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."<sup>121</sup> The Supreme Court stated in *First English* that:

We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting

114. See *Van Voorhis v. State*, 21 Misc. 2d 86, 197 N.Y.S.2d 119 (Ct. Cl. 1960); *Meloon Bronze Foundry, Inc. v. State*, 8 Misc. 2d 286, 166 N.Y.S.2d 586 (Ct. Cl. 1957), *rev'd on other grounds*, 6 A.D.2d 993, 176 N.Y.S.2d 452 (4th Dep't 1958); *Porter v. State*, 5 Misc. 2d 28, 159 N.Y.S.2d 549 (Ct. Cl. 1957); *Queensboro Farm Prods., Inc. v. State*, 6 Misc. 2d 445, 161 N.Y.S.2d 989 (Ct. Cl. 1956), *aff'd*, 5 A.D.2d 967, 171 N.Y.S.2d 646 (4th Dep't 1958), *aff'd*, 5 N.Y.2d 977, 157 N.E.2d 719, 184 N.Y.S.2d 844 (1959).

115. 51 N.Y. JUR. 2D, *Eminent Domain*, § 80 (1986). New York Courts have long recognized that a taking that requires just compensation may occur without a formal appropriation proceeding.

116. 51 N.Y. JUR. 2D, *Eminent Domain*, § 81 (1986). See also *City of Buffalo v. J.W. Clement Co., Inc.*, 28 N.Y.2d 241, 253, 269 N.E.2d 895, 902, 321 N.Y.S.2d 345, 355 (1971) (stating "it has long been recognized by the courts of this State that the constitutional provision against the taking of property without just compensation may be violated without a physical taking.") *Id.*

117. 51 N.Y. JUR. 2D, *Eminent Domain*, § 81 (1986).

118. 482 U.S. 304 (1987).

119. *First English*, 482 U.S. 304. See also *Seawall Assocs. v. City of N.Y.*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989), *cert. denied*, 493 U.S. 976 (1989) (following *First English*).

120. *First English*, 482 U.S. at 307.

121. *Id.* at 318.

land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them.<sup>122</sup>

The use of consolidated planning boards may fall into the category of a *de facto* taking. While it has been held that mere interference with trade or business is not compensable under the Fifth Amendment,<sup>123</sup> the use of joint planning boards may create a *de facto* building moratorium because municipalities are authorized to create another layer of planning review with unlimited decision-making authority. This extra layer of review may freeze land development for an indefinite amount of time.<sup>124</sup> Building moratoria are interim controls on the use of land which seek to maintain the status quo with regard to land development in an area by either "freezing existing land uses or by allowing the issuance of building permits for only certain land uses that would be consistent with a contemplated zoning plan or zoning change."<sup>125</sup> These moratoria will be deemed *de facto* takings, which require compensation, when they temporarily deny a property owner all reasonable use of his land, are not limited as to time, and do not further a significant public purpose.<sup>126</sup>

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122. *Id.* at 321.

123. *See, e.g.,* Panhandle E. Pipeline Co. v. Corporation Comm'n of Okla., 715 F. Supp. 1055 (W.D. Okla. 1989) (holding that consequential damages in form of frustration or destruction of contracts are not compensable under the Takings Clause).

124. Municipalities under the present statutes may grant to their joint planning board any authority that their individual planning boards already have. 1992 N.Y. Laws 724. What the statutes fail to take into account, however, is the myriad of factors that will go into a joint planning board's decision-making process when it is composed of representatives of several municipalities. For example, when a dispute arises between the members on the board over the approval of a development project, unnecessary delay will result in a building moratorium until it can be decided which municipality's comprehensive plan will apply to the project in question. This extra layer of committee review and approval is unnecessary since final decision-making authority should rest in the individual municipalities themselves.

125. 1 ZEIGLER, *supra* note 6, § 11.01(3).

126. *Id.* § 11.09(1)(3). *See also In re West Lane Properties v. Lombardi*, 139 A.D.2d 748, 749, 527 N.Y.S.2d 498, 499 (2d Dep't 1988) (holding an express ninety day moratorium reasonable in light of the circumstances).

While courts have recognized that a temporary restraint of beneficial enjoyment of a parcel of land by a municipality to promote the ultimate good of the municipality as a whole, or of an immediate neighborhood, is a valid exercise of police power,<sup>127</sup> a “prolonged and continued procrastination and unreasonable delay on the part of the municipality . . . might well ripen into an unconscionable and unconstitutional ‘taking’ of [private] property.”<sup>128</sup>

Intergovernmental cooperation may, in fact, relate to the promotion of the public’s health, safety, and welfare.<sup>129</sup> However, the use of a consolidated planning board may not further the promotion of the health, safety, or welfare of the communities it seeks to regulate because it may ultimately cause substantial loss in revenue by delaying development.<sup>130</sup>

It is an unquestionable advantage for municipalities to combine their resources so as to deal effectively with many of today’s land use problems. Some of these problems include air and water quality, suburban sprawl, and the “need for fair and efficient allocation of available space among competing demands.”<sup>131</sup> Among the numerous reasons cited in the implementation of inter-local agreements are: potential cost savings, more efficient use of volunteers, enhanced educational opportunities, greater consistency with regional or county partnerships, and “rational resource protection and economic development efforts which reflect extra-municipal boundaries.”<sup>132</sup> Indeed, it would be beneficial if two or more municipalities combined so as to promote these objectives.<sup>133</sup> Nevertheless, the New York

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127. See *Westwood Estates v. Village of South Nyack*, 23 N.Y.2d 424, 428-29, 244 N.E.2d 700, 702-03, 297 N.Y.S.2d 129, 133 (1969). See also *Grisor, S.A. v. City of New York*, 83 Misc. 2d 1054, 1057, 374 N.Y.S.2d 549, 552 (Sup. Ct. Richmond County 1975), *rev'd on other grounds*, 54 A.D.2d 685, 387 N.Y.S.2d 271 (2d Dep't 1976) (holding that mapping of land which temporarily restrained private owner's enjoyment thereof was a valid exercise of police power since it was designed to promote the public good).

128. *Grisor*, 83 Misc. 2d at 1058, 374 N.Y.S.2d at 553.

129. Inter-local cooperation may in fact save valuable resources, provide further insights and wisdom by pooling distinct ideas and plans, and promote lasting relationships between municipalities.

130. See discussion *supra* part II-C.

131. 1 ROHAN, *supra* note 3, § 33.01(1)(a).

132. *Id.* § 33.01(1)(b)(ii).

133. For some good examples of regional planning commissions that delayed development for legitimate reasons, see *Wambat Realty Corp. v. State*, 41 N.Y.2d

statutes bear no relation to these legitimate objectives and allow for the creation of consolidated planning boards on whatever pretense. As a result, a joint planning board's actions may have no rational relation to the general welfare whatsoever, serving only to delay development through an unreasonable deliberation on regional planning issues that may have no bearing on the individual municipality.

#### IV. Statutes in Derogation of the Common Law Receive a Strict Construction<sup>134</sup>

It is a settled rule of law that statutes restricting the use of land, being in derogation of the common law, must be narrowly construed.<sup>135</sup> As a result, the aforementioned provisions of the Town Law, Village Law and General City Law must be construed to mean that the joint planning boards may only act in an advisory capacity, may not have any decision-making power, and may not take into account the private interests of nonresident landowners since any other construction would be unconstitutional and violative of the common law of the State of New York.

A municipality does not have the power to impose its own zoning regulations upon lands outside its territorial limits.<sup>136</sup>

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490, 362 N.E.2d 581, 393 N.Y.S.2d 949 (1977) (holding that regional control over the Adirondack Park region was not invalid as encroaching on the planning powers of local governments because the matter of the preservation of the Park was of state-wide concern); CAL. GOV'T CODE § 66610 (West 1983) (defining the San Francisco Bay Conservation and Development Commission); *Navajo Terminals, Inc. v. San Francisco Bay Conservation and Dev. Comm'n*, 120 Cal. Rptr. 108 (Cal. Ct. App. 1975) (holding that while "an *undue* restriction on the use of private property is as much a taking for constitutional purposes as appropriating or destroying it," the adoption of a resolution that fixed and established water-oriented priority land uses did not impose an undue restriction). *Id.* (quoting *Candlestick Properties, Inc. v. San Francisco Bay Conservation and Dev. Comm'n*, 89 Cal. Rptr. 897, 906 (Cal. Ct. App. 1970)).

134. N.Y. STATUTES LAW § 301(a) (McKinney 1971).

135. *FGL & L Property Corp. v. City of Rye*, 66 N.Y.2d 111, 115, 485 N.E.2d 986, 988-89, 495 N.Y.S.2d 321, 323-24 (1985); *Veza v. Bauman*, 192 A.D.2d 712, 713, 597 N.Y.S.2d 418, 419, (2d Dep't 1993); *In re Hess Realty Corp. v. Planning Comm'n*, 198 A.D.2d 588, 589, 603 N.Y.S.2d 95, 96 (3d Dep't 1993).

136. *See, e.g., Kennedy v. Zoning Bd. of Appeals*, 145 A.D.2d 487, 535 N.Y.S.2d 636 (2d Dep't 1988) (holding that Town of Dobbs Ferry had no jurisdiction to force Village of Hastings-On-Hudson to accept construction of an oversized structure on a lot bordering the two municipalities and that was substandard under the latter's zoning ordinances); *In re Siegel v. Tange*, 61 A.D.2d 57, 59-60,

As a result, sections 20-g of the General City Law, 284 of the Town Law, and 7-741 of the Village Law may not be extended so broadly as to give plenary power to one municipality over the land located within another. While a municipality may take into account considerations of adjacent land in adopting its own zoning and planning regulations, such consideration is not mandated.<sup>137</sup>

It is useful to review statutes from other jurisdictions dealing with intergovernmental cooperation. While no other jurisdiction has a statute that expressly mentions the power to create a "consolidated planning board," comparable statutes do exist.<sup>138</sup> However, these statutes clearly mark out the parameters of a contract that two municipal corporations may enter into. Some jurisdictions expressly denote the purpose of promoting the health, safety, or welfare of the community.<sup>139</sup> Others require extensive democratic checks on the municipal decision to enter into an interlocal agreement or regional planning commission.<sup>140</sup> All expressly lay out the powers, duties and functions of their regional planning commissions,<sup>141</sup> and some provide for the voting, representation, appointment, or terms of office procedures for their regional planning commissions.<sup>142</sup> Some even limit the role of their regional planning commissions to that of a mere advisor.<sup>143</sup>

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401 N.Y.S.2d 269, 271 (2d Dep't 1978). See also 1 ROBERT M. ANDERSON, NEW YORK ZONING LAW AND PRACTICE § 5.15 (3d ed. 1984).

137. *Freihofer v. Lake George Zoning Bd. of Appeals*, 137 A.D.2d 894, 524 N.Y.S.2d 866 (3d Dep't 1988).

138. Most jurisdictions either provide for the creation of a "regional planning commission" or deal in one way or another with interlocal contracts. While their wording is similar to the New York statutes, all other jurisdictions either severely limit the power of these commissions or provide for rigid regulations in adopting interlocal contracts.

139. See MASS. GEN. LAWS ANN. ch. 40B, § 2 (West 1994) ("to promote . . . the general welfare and prosperity of their citizens.") *Id.*

140. See CONN. GEN. STAT. ANN. § 8-31a (West 1989); MASS. GEN. LAWS ANN. ch. 40B, § 3 (West 1994); PA. STAT. ANN. tit. 53, §§ 484-86 (1974); VT. STAT. ANN. tit. 24, § 4802 (1992).

141. See CAL. GOV'T CODE § 65065.1 (West 1983); CONN. GEN. STAT. ANN. § 7-339b (West 1989); MASS. GEN. LAWS ANN. ch. 40B, § 5 (West 1994); VT. STAT. ANN. tit. 24, §§ 4832, 4862 (1992).

142. See CONN. GEN. STAT. ANN. §§ 7-339C, 7-339F (West 1989); VT. STAT. ANN. tit. 24, § 4863 (1992).

143. See MASS. GEN. LAWS ANN. ch. 40B, § 5 (West 1994).



New York's statutes, by omitting all these specific provisions, have opened themselves up to a variety of interpretations. Because the common law in New York has always recognized that private property rights are supreme, these statutes should be interpreted as narrowly as possible.

New York courts have recognized that a municipality has no extra-territorial jurisdiction. For instance, in *Freihofer v. Lake George Zoning Board of Appeals*,<sup>144</sup> the owner of a lake-shore lot which was bisected by the boundary line of two towns (Lake George and Queensbury), had applied to the zoning enforcement officer of one town for a permit to construct a single family residence on the parcel located within the Town of Lake George.<sup>145</sup> The owner already had one single family residence on the parcel located within Queensbury. The Lake George Zoning Ordinance, however, permitted only one single family residence to be built on each parcel.<sup>146</sup> The Third Department upheld the decision of the Zoning Board in granting the permit to the owners for two relevant reasons. First, the Court held that zoning laws are in derogation of common law property rights and thus must be strictly construed, avoiding extension by implication.<sup>147</sup> Second, the Court held that a town may consider abutting land in separate towns irrelevant in the determination of the property rights of their own citizens.<sup>148</sup>

If one were to read sections 20-g of the General City Law,<sup>149</sup> 284 of the Town Law<sup>150</sup> and 7-741 of the Village Law<sup>151</sup> as permitting a municipality to abdicate its inherent right to regulate its own land as it sees fit, the New York State Legislature would have enacted statutes that are directly in conflict with the common law rights of the municipalities and their citizens. Therefore, even if joint planning boards were held not to be per se unconstitutional, the instant statutes, which are in derogation of the common law right to develop one's property without interference from the government, must be read as limiting the pow-

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144. 137 A.D.2d 894, 524 N.Y.S.2d 866 (3d Dep't 1988).

145. *Id.* at 894, 524 N.Y.S.2d at 866.

146. *Id.* at 894, 524 N.Y.S.2d at 867.

147. *Id.*

148. *Id.*

149. N.Y. GEN. CITY LAW § 20-g (McKinney Supp. 1996).

150. N.Y. TOWN LAW § 284 (McKinney Supp. 1996).

151. N.Y. VILLAGE LAW § 7-741 (McKinney Supp. 1996).

ers of the joint planning board to an advisory role. As in *Freihofer*, a town should not abridge its citizens' property rights by giving greater weight to consideration of property which is located outside its boundaries. The power of a joint planning board should not be unconstitutionally extended so that it has final decision-making authority.

### Conclusion

Joint planning boards have no place in the exercise of land use regulation. They are per se unconstitutional and violate notions of due process and equal protection in regard to property rights, voting rights, and home rule. The provisions of the General City Law, the Town Law, and the Village Law dealing with intermunicipal cooperation merely serve to make matters worse by granting broad and unlimited powers to these unconstitutional, quasi-legislative entities. As a result, these statutes must be struck down or, at the very least, the statutes should be narrowly construed as granting joint planning boards advisory power only.

