

TOWN LAW §§ 261-c, 274-a, 274-a(1), 274-a(2); MUNICIPAL HOME RULE LAW §§ 10, 10(1)(ii)(a)(1), 10(1)(ii)(a)(14), 10(1)(ii)(d)(3); STATUTE OF LOCAL GOVERNMENT § 10(6)

A town board is authorized to establish a second planning board to review and determine only site plans within a proposed planned development district.

January 13, 2012

Alicia S. O'Connor  
Town Attorney  
Town of Islip  
Town Hall  
Islip, New York 11751

Informal Opinion  
No. 2012-1

Dear Ms. O'Connor:

You have requested an opinion regarding whether the Town is authorized to establish, in addition to its regular planning board, a special planning board that will be limited in its jurisdiction. You have explained that the town board is entertaining an application for a change of zone to create a planned development district pursuant to Town Law § 261-c.<sup>1</sup> The developer proposes to develop a 452-acre parcel to include a range of mixed uses, including housing, office buildings, retail, entertainment, and civic uses. The developer further proposes to submit site plan applications for approval of segments or blocks in a series of single applications. The Town anticipates that completion of the development project will take 15 to 20 years, to be completed in phases.

The Town is concerned that the site plan review for this development project will overburden the existing planning board.<sup>2</sup> Thus, the Town is contemplating

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<sup>1</sup> Pursuant to Town Law § 261-c, a town legislative body is authorized to enact, as part of its zoning local law or ordinance, procedures and requirements for the establishment and mapping of planned unit development zoning districts. Planned unit development district regulations are intended to provide for residential, commercial, industrial or other land uses, or a mix thereof, in which economies of scale, creative architectural or planning concepts and open space preservation may be achieved by a developer in furtherance of the town comprehensive plan and zoning local law or ordinance.

<sup>2</sup> "Site plan" means a rendering, drawing, or sketch prepared to specifications and containing necessary elements, as set forth in the applicable zoning ordinance or local law, which shows the arrangement, layout, and design of the proposed use of a single parcel of land as shown on the plan. Town Law § 274-a(1).

creation of a separate planning board that will consider applications for site plans only within the planned development district.

We believe that the town board is authorized to create the contemplated special planning board to review and decide only applications for site plans within the planned development district. First, Town Law § 274-a(2) expressly provides that the town board may give the power to review and approve or disapprove site plans to "the planning board or such other administrative body that it shall so designate." On its face this provision grants town boards the flexibility to determine what local board should have jurisdiction over site plan review.

Second, the broad authority of Municipal Home Rule Law § 10 allows the town board to adopt local laws in several areas relevant here. It may adopt local laws relating to the property, affairs, and government of the Town, to the powers and duties of its officers and employees, and to the powers granted to it by the Statute of Local Governments, and it may amend or supersede any provision of the Town Law in relation to matters on which it is authorized to adopt local laws, except to the extent the Legislature restricts the adoption of such a local law. Municipal Home Rule Law § 10(1)(ii)(a)(1),(a)(14),(d)(3). Because the town board has the power to adopt, amend, and repeal zoning regulations, Statute of Local Governments § 10(6), it therefore has the power to supersede a provision of the Town Law in its application to the town and the power to adopt zoning regulations. These powers in turn have been held to authorize the creation of a special board to which the town board delegated the authority to determine certain applications. *See Matter of Torsoe Bros. Constr. Corp. v. Architecture & Cmty. Appearance Bd. of Review*, 120 A.D.2d 738 (2d Dep't 1986) (site plan review by special board); *see also Sherman v. Frazier*, 84 A.D.2d 401 (2d Dep't 1982) (upholding town's authority to create board to determine special permit applications by those who own illegally converted two-family houses); *Kasper v. Town of Brookhaven*, 142 A.D.2d 213 (2d Dep't 1988) (same, accessory apartment permits).

For both of these reasons, we believe that establishing a special board as you have described falls within the town board's authority. The remaining question is whether the Legislature has restricted the town board's exercise of this authority. This question arises because in the 1990s, the Legislature enacted a series of laws that amended the zoning provisions of the Town Law and the analogous provisions in the Village Law and the General City Law. Subsequently, the Court of Appeals held in *Matter of Cohen v. Bd. of Appeals of Vill. of Saddle Rock*, 100 N.Y.2d 395 (2003), that the amendment of a provision of the zoning laws governing villages constituted a restriction by the Legislature that prevented villages from superseding it. At issue was a local law adopted to re-establish, within the village, a standard of review of applicants' denials of area variances that had existed under

the pre-amended zoning provisions of the Village Law. The village argued that its supersession authority allowed it to amend, insofar as it applied to the village, the new standard enacted by the Legislature. The Court disagreed, holding that the Legislature had intended to occupy the field of area variance review, and thus that it had preempted local supersession authority. 100 N.Y.2d at 402.

We are of the opinion, however, that the holding in *Cohen* does not apply to Town Law § 274-a. In light of the express language in Town Law § 274-a(2) permitting a town board to authorize the planning board or another administrative body to review and decide site plans, we believe that the Legislature has not evinced an intent to preempt the town board's authority to select, by local legislation, the board designated to review site plans.

We therefore are of the opinion that the town board is authorized to establish a second planning board that will review and determine only site plans within the proposed planned development district.

You have further asked whether a member of the existing planning board can be a member of the special planning board. You have explained that the special board will have either three or five members and that the number of members of the existing planning board appointed to the special planning board will constitute less than a majority of the special board.

Because the planning boards will not have overlapping jurisdictions, nor will either board have any review or oversight responsibility over the other, we believe that the positions of planning board member and special planning board member are compatible. We have identified no other restriction on the town board's ability to appoint planning board members to the special planning board in a number that will constitute less than a majority of the special planning board.

The Attorney General issues formal opinions only to officers and departments of state government. Thus, this is an informal opinion rendered to assist you in advising the municipality you represent.

Very truly yours,

KATHRYN SHEINGOLD  
Assistant Solicitor General  
in Charge of Opinions