

Fordham Environmental Law Review

Volume 13, Number 2

2001

Article 2

Protecting the Environment at the Local Level- New York City's Special District Approach

Christopher Rizzo*

*Pace University School of Law

Copyright ©2001 by the authors. *Fordham Environmental Law Review* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/elr>

ARTICLE

PROTECTING THE ENVIRONMENT AT THE LOCAL LEVEL: NEW YORK CITY'S SPECIAL DISTRICT APPROACH

*Christopher Rizzo**

INTRODUCTION

New York City's vast land area requires special zoning tools to preserve its unique natural environment. Urban areas, like New York City, require special land use protections due to the scarcity of natural resources and open space.¹ With 321 square miles of land area² and 578 miles of coastline,³ New York City has developed a complicated zoning code to address the competing needs of its

* J.D., Pace University School of Law; B.A., Manhattan College. The author practices environmental and land use law at the law firm of Cole, Schotz, Meisel, Forman and Leonard in New Jersey. He is admitted to practice law in New York and New Jersey.

1. See Jill Ilan Berger Inbar, *A One Way Ticket to Palookaville, Supreme Court Takings Jurisprudence After Dolan and Its Implications for New York City's Waterfront Zoning Resolution*, 17 CARDOZO L. REV. 331, 369 (1995).

2. N.Y. CITY DEP'T OF CITY PLANNING, LAND USE FACTS (2002), at <http://www.ci.nyc.ny.us/html/dcp/html/lufacts.html> (last visited Apr. 2, 2002).

3. N.Y. CITY DEP'T OF CITY PLANNING, NEW YORK CITY COMPREHENSIVE WATERFRONT PLAN: RECLAIMING THE CITY'S EDGE 1 (1992) [hereinafter COMPREHENSIVE WATERFRONT PLAN].

populace.⁴ It fosters commercial and industrial development, while preserving suburban neighborhoods and unique natural areas.⁵ Twenty percent of the land area, fifty square miles, is designated open space.⁶ Another forty square miles of land remains undeveloped.⁷ While New York City is world renowned for its skyscrapers and urban density, much of the city is actually suburban in character, with 30% of the land area dominated by single and two family homes.⁸ It is this striking contrast of character that has forced the City to develop its unique "Special District" approach to zoning. This article details this environmental zoning scheme and the challenges faced in recent years.

The Special Districts are created to serve multifarious community needs, ranging from promoting businesses to protecting sensitive hillsides.⁹ New York courts have recognized the novelty of the approach and maintained that "[s]pecial district zoning . . . represents a significant departure from traditional Euclidean zoning concepts."¹⁰ The New York Court of Appeals considers the approach "one of the several imaginative schemes intended to encourage, or even coerce, private developers into making New York City a more pleasant and efficient place to live and work."¹¹ These districts are "overlay zones,"¹² supplementing underlying zones and in some circumstances authorizing development by special permit only.¹³

4. See generally New York, N.Y., Zoning Resolution (2001).

5. See generally *id.*

6. See N.Y. CITY DEP'T OF CITY PLANNING, *supra* note 2.

7. See *id.*

8. *Id.*

9. See New York, N.Y., Zoning Resolution § 105-00 (2001).

10. Asian Americans for Equal. v. Koch, 527 N.E.2d. 265, 269 (N.Y. 1988).

11. *Id.*

12. "The term 'overlay district' refers to the superimposition of the new district's lines on the zoning map's district designations. An overlay district can be coterminous with existing zoning districts or contain only parts of one or more such districts." JOHN R. NOLON, WELL GROUNDED: SHAPING THE DENSITY OF THE EMPIRE STATE, LOCAL LAND USE AND PRACTICE 184 (1988).

13. See generally *id.* (describing the definition, structure, purpose and implementation of overlay zones).

Cities can design overlay districts to address a wide array of community concerns.¹⁴ The New York Court of Appeals described the wide purview of Special Districts by stating that a wide array of physical and natural characteristics of neighborhoods can be considered.¹⁵ With over forty Special Districts, important concerns such as business retention, housing development, scenic view, cultural and natural area preservation have been addressed.¹⁶

Despite legal challenges in the 1980s,¹⁷ the special district technique has repeatedly been found legal, as long as it is applied

14. *See id.* at 185–87.

15. N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (McKinney 2001); *see also* Chinese Staff & Workers Ass’n v. City of New York, 502 N.E.2d 176, 179 (N.Y. 1986). Because the proposed development in the Special Manhattan Bridge District was larger than of that permitted, an environmental impact analysis was required. The character of that community was a concern such that The Board of Estimate (ruled unconstitutional in *Board of Estimate v. Morris*, 498 U.S. 688 (1989), and later abolished by a NYC Council Charter revision) had to consider the environmental impacts of the project as defined in the State Environmental Quality Review Act (“SEQRA”). *Id.*

16. *See, e.g.*, New York, N.Y., Zoning Resolution § 11-12 (2001) (listing the chapters within the Zoning Resolution that provide for the functions and regulations of the Special Districts). The Special Districts listed include, but are not limited to, the Midtown District, Manhattan Bridge District, Scenic View District, Little Italy District, and Special Natural Area District. *Id.*

17. *See, e.g.*, *Agins v. City of Tiburon*, 447 U.S. 255, 257 (1980) (challenging city takings without just compensation); *Park Ave. Tower Assocs. v. City of New York*, 746 F.2d 135, 136 (2d Cir. 1984) (challenging zoning changes reducing maximum floor area ratios from 18 to 13 depriving them from “reasonable return”); *Corrigan v. City of Scottsdale*, 720 P.2d 513, 514 (Ariz. 1986) (challenging zoning ordinances); *Asian Americans for Equal. v. Koch*, 527 N.E.2d 265, 267 (N.Y. 1988) (challenging the Special Manhattan Bridge District in Chinatown); *Chinese Staff & Workers Ass’n v. City of New York*, 502 N.E.2d at 177 (challenging the City Planning Commission and board actions approving special permit for construction of proposed high-rise luxury condominiums); *In re Save the Pine Bush, Inc., v. City of Albany*, 512 N.E.2d 526, 527

fairly and uniformly.¹⁸ Recent opposition has come from preservationists who call New York City's Zoning Resolution desperately inadequate in its treatment of the City's less dense communities.¹⁹ While sprawl²⁰ is the concern of suburbs and edge cities, the loss of neighborhood character and open space are consistent problems faced by New York City. Some communities can mitigate sprawl by acquiring sensitive parcels; however, this is not economically feasible in the high priced New York City real estate market.²¹ Critics of the Zoning Resolution also maintain that it makes development vastly unpredictable.²² For example, the "tower in a park"²³ option allows developers to preserve open space by increasing the vertical bulk of a building.²⁴ The results, if developers choose this option, are green spaces in the outer boroughs, and

(N.Y. 1987) (challenging zoning regulations); *Allingham v. City of Seattle*, 749 P.2d 160, 161 (Wash. 1988) (challenging zoning ordinances that required large percentages of privately owned lots to be retained in natural state).

18. *Asian Americans for Equal.*, 527 N.E.2d at 273; see also *Agins*, 447 U.S. at 262 (standing for the legality of special zoning techniques so long as they are uniformly applied).

19. See generally New York, N.Y., Zoning Resolution (2001) (listing the New York City's land use rules).

20. "Sprawl is 'low-density, land consumptive, centerless, auto-oriented development, typically located on the outer suburban fringes.' Sprawl increases traffic, air pollution, noise pollution and infrastructure costs." Marc A. Yaggi, *Impervious Surfaces in the New York City Watershed*, 12 FORDHAM ENVTL. L.J. 489 (2001).

21. See Haya El Nasser, *Residents Chip in to Protect Land*, DETROIT NEWS, Aug. 29, 1999, at A15. In Warren Township, New Jersey residents all contributed to purchase a seven-acre parcel, at \$125,000 per acre. *Id.* In New York City, an acre of property can cost over \$1,000,000.

22. See David W. Dunlap, *A Complex Plan's Aim: Simpler Zoning Rules*, N.Y. TIMES, Jan. 30, 2000, at 11-1, 11-6.

23. Such zoning "yields buildings vastly out of scale with their neighbors. . . ." *Id.* at 11-1.

24. *Id.* Development can increase the height of the building by maintaining open space around it. Increased height can also be accomplished by purchasing unused height from neighboring parcels. *Id.*

public plazas in Manhattan, at the center of which are buildings vastly out of scale with their surroundings.²⁵ Arguably, it might be impossible to rely on zoning regulations to predict how a community will change.

The results of these criticisms have been a general reevaluation of the zoning laws and a movement to strengthen the protections of the environment contained in the Special Districts.²⁶ Despite all these changes, a comprehensive proposal to address these enforcement issues does not exist.²⁷

This Article will discuss four types of special districts in New York City—the Hillside Preservation District, the Special Natural Area District, the Special Natural Waterfront Areas—created by the Comprehensive Waterfront Plan, and the South Richmond Special Development District.²⁸ Part I of this article will analyze the source of, and limitations on New York City's power to create special districts to protect open space and the environment. Part II will briefly explain how each district works. Part III will survey the challenges to the Special Districts along with the City's responses. Part IV will look at the challenge of implementing better enforcement of the District regulations.

I. THE LEGALITY OF SPECIAL DISTRICTS

Zoning laws can be created to discourage premature and unnecessary conversion of open space land to urban uses.²⁹ Outside of New York City, communities are able to increase dramatically the

25. *Id.*

26. *See, e.g.*, N.Y. CITY DEP'T OF CITY PLANNING, SPECIAL HILLSIDES PRESERVATION DISTRICT ZONING STUDY: FINDINGS AND RECOMMENDATIONS 1, 4-7 (1998) [hereinafter SPECIAL HILLSIDES PRESERVATION].

27. *See* Minutes, Natural Area District Task Force (Jan. 11, 2000) (on file with *Fordham Environmental Law Journal*); Minutes, Natural Area District Task Force (Mar. 20, 2000) [hereinafter March Minutes] (on file with the *Fordham Environmental Law Journal*).

28. *See generally* New York, N.Y., Zoning Resolution (2001); COMPREHENSIVE WATERFRONT PLAN, *supra* note 3.

29. *Agins v. City of Tiburon*, 447 U.S. 255, 257 (1980).

lot area required for a home.³⁰ Goals of large lot zoning include both open space and aesthetic preservation.³¹ Reducing density in New York City is also permitted even if the value of the property is correspondingly reduced.³² Given this broad zoning power, courts have repeatedly upheld and enforced the Special Districts of New York City.³³

There are also constraints on the power to create Special Districts. Under New York's City Environmental Quality Review ("CEQR"), a hard look must be given to the potential impacts of a proposed district on the surrounding community.³⁴ For example, New York City was able to create a Special Garment District, to preserve manufacturing space for its clothing industry after the CEQR review showed that the character of the neighborhood would not be harmed.³⁵ Note that a preservation district's formation must be accompanied by a consideration of the socio-economic impacts, which in this case indicated the character of the community would actually be preserved by an overlay zone.³⁶

An incentive overlay zone is one that seeks to change, rather than preserve, the character of the community.³⁷ For example, the Special Manhattan Bridge District in Chinatown was created after a study found substandard housing plagued the area.³⁸ The District allows increased density in exchange for community amenities like senior

30. *Id.*

31. *Rivervale Realty Co. Inc. v. Town of Orangetown*, 816 F. Supp. 937, 940-41 (S.D.N.Y. 1993).

32. *See Park Ave. Tower Assocs. v. City of New York*, 746 F.2d 135, 139 (2d Cir. 1984). The Court called mere reduction in value a "slender reed upon which to rest a takings claim." *Id.*

33. *See Neville v. Koch*, 593 N.E.2d 256 (N.Y. 1992) (upholding the Special Clinton District); *Asian Americans for Equal. v. Koch*, 527 N.E.2d 265, 271, 273 (N.Y. 1988) (upholding the Special Manhattan Bridge District).

34. *See Real Estate Bd. of N.Y. v. City of New York*, 556 N.Y.S.2d 853, 854 (App. Div. 1990).

35. *Id.* at 854.

36. *Id.* at 855. Finding that the district at issue conformed with the standard enunciated in *Chinese Staff & Workers Ass'n v. City of New York*, 502 N.E.2d 176, 179 (N.Y. 1986).

37. *See generally* NOLON, *supra* note 12.

38. *See Asian Americans for Equal.*, 527 N.E.2d at 268.

citizen centers, daycare, low-income housing, or deteriorated housing redevelopment.³⁹ A challenge to this District was rebuffed⁴⁰ and the Court of Appeals in New York upheld both preservation and improvement oriented special districts.⁴¹

While special zoning districts that protect the environment have not been challenged in New York City, they have been upheld when challenged in other parts of New York State.⁴² The Town of Islip on Long Island created an Oceanfront Dune District with the purpose of preserving “the ecology of the dunes and grasses and to safeguard life and property on the barrier beach known as ‘Fire Island.’”⁴³ The Court upheld the Dune District even without a comprehensive study, and stated that “judicial notice must be taken of the fragility of the ecology of Fire Island.”⁴⁴ This District is comparable with those of New York City.⁴⁵ Another example is a district in Albany created in a pine barren with “a number of distinct environmental characteristics worthy of protect[ion].”⁴⁶

The basis for the Special Natural Area Districts, as discussed in *In re Save the Pine Bush* is the following:

Special Natural Area Districts may be mapped only in areas where outstanding natural features or areas of natural beauty are to be protected. The preservation of such areas is important because they contain areas of special ecological significance: interesting geologic formations such as rock

39. *Id.* at 269.

40. *Id.*

41. *Id.* at 273.

42. Two cases have dealt with the Special Natural Districts. Both summarily recognized the NYCDCP’s special review powers. *City of New York v. Delafield 246 Corp.*, 662 N.Y.S.2d 286 (App. Div. 1997); *Coppotelli v. Comm’r of the Dep’t of Buildings*, 646 N.Y.S.2d 773 (Sup. Ct. Richmond County 1996).

43. *Lemp v. Town Bd. of Islip*, 394 N.Y.S.2d 517, 523 (Sup. Ct. Suffolk County 1977).

44. *Id.* at 523.

45. See generally New York, N.Y., Zoning Resolution § 105-01 (2001) (describing the special districts of NYC).

46. *In re Save the Pine Bush, Inc., v. City of Albany*, 512 N.E.2d 526, 528 (N.Y. 1987).

outcrops, . . . tidal wetlands . . . important plant life . . . or because they serve as habitats for native flora and fauna.⁴⁷ It balances commercial development with natural protection.⁴⁸ Other legitimate concerns include wetland and scenic view protection.⁴⁹ Overall, courts in New York are willing to support special environmental districts as valid exercises of municipal police power when they are substantiated by legitimate environmental concerns.⁵⁰

A. *Once a District is Created Its Provision Must be Enforced*

Whether created to preserve community character or natural resources, municipalities in New York must enforce the special districts they create. When New York City attempted to allow a high rise in Chinatown's Special Manhattan Bridge District, the Court admonished the City for not adequately considering the impact of the high-rise on the community under both the SEQRA and CEQR.⁵¹ This special district had been created to preserve the low-rise character of Chinatown.⁵² Similarly, the City of Albany was required to enforce the provisions of its natural area, Pine Bush.⁵³ The Court of Appeals found that Albany should have considered the

47. *Id.*

48. *Id.* The court found that Albany's District appropriately balanced commercial development with environmental protection through its Pine Bush Site Plan Review District. Multistory buildings were permitted only after a careful analysis of the development proposal. *See id.* at 528. However, in this case the court found that while the district was valid, Albany had not adequately considered a proposal under its own process: the impact a five building two story office complex would have on the Pine Bush. *See id.* at 531.

49. *See Basile v. Town of Southampton*, 89 N.Y.S.2d 877, 879 (1997); *In re Wal-Mart Stores, Inc. v. Planning Bd. of the Town of North Elba*, 238 A.D.2d 93, 98 (App. Div. 1998).

50. *See generally Basile*, 89 N.Y.S.2d at 877; *In re Wal-Mart Stores, Inc.*, 238 A.D.2d at 93.

51. *Chinese Staff & Workers Ass'n v. City of New York*, 502 N.E.2d 176, 179 (N.Y. 1986).

52. *See id.*

53. *In re Save the Pine Bush, Inc., v. City of Albany*, 512 N.E.2d 526, 527 (N.Y. 1987).

cumulative impact that several multi-story developments would have on the District.⁵⁴

B. *Limitations on Municipal Power*

Conversely, overlay districts may be too vigorously enforced.⁵⁵ The most notable challenge to a special district in New York was based on the takings doctrine.⁵⁶ Its main concern is taking too much value from a landowner without compensation.⁵⁷

A two-part test is applied to a zoning technique to determine if a taking is occurring, which considers whether it substantially advances a legitimate state interest, and whether it denies an owner all economically viable uses of his land.⁵⁸ The special environmental districts discussed in this Article do advance a legitimate state interest.⁵⁹ As discussed in Part II, modification provisions are built into the Special District texts to ensure that no landowner is completely deprived of an economic return on their land.⁶⁰ These modification provisions allow for waivers of the regulations to avoid unduly harsh results for landowners.⁶¹

In 1993, New York City attempted to preclude development entirely with a “Special Park District,” which was composed of private residential property.⁶² In *Fred French Investing Co. v. City of New York*,⁶³ the City’s designation of privately owned land as open space was challenged.⁶⁴ The Court found that the City was attempting to commit land for a public use without taking title to it.⁶⁵ The “City’s action, in rezoning the areas of the private parks into

54. *Id.* at 531.

55. NOLON, *supra* note 12, at 187.

56. *See generally* Fred French Investing Co. v. City of New York, 352 N.Y.S.2d 762 (Sup. Ct. N.Y. County 1973).

57. *See generally id.*

58. *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980).

59. *See generally supra* notes 28–32 and accompanying text.

60. *See infra* Part II.B.2.

61. *See* New York, N.Y., Zoning Resolution § 105-50(l) (2001).

62. *See* Fred French Investing Co. v. City of New York, 352 N.Y.S.2d 762, 764 (Sup. Ct. N.Y. County 1973).

63. *Id.*

64. *Id.* at 765.

65. *Id.* at 766.

public recreational areas, . . . totally destroyed the economic value of such plots.”⁶⁶ This case stands as an important limit on the ability to restrict development with Special Districts.⁶⁷

This early decision is particularly meaningful since the defunct Special Park District shares an important characteristic with the South Richmond Development District, both restructured development on private open space.⁶⁸ On Fire Island, for example, a regulation restricting waterfront development in an “Ocean Front Dune District,” which destroyed the value of plaintiff’s 6400 square foot parcel of land⁶⁹ was successfully challenged.⁷⁰ It is important to recognize that when development is precluded on only part of the special district parcel, a taking has not occurred.⁷¹ The aforementioned cases are concerned with only the destruction and, not a reduction of value.⁷² Thus, both the “Ocean Front Dune District” and “Special Park District” were declared invalid.⁷³

66. *Id.* at 762, 766.

67. *Id.*

68. *See* discussion *infra* Part II.D.

69. *Lemp v. Town Bd. of Islip*, 394 N.Y.S.2d 517, 519 (Sup. Ct. Suffolk County 1977).

70. *Id.* at 523.

71. *Presbytery of Seattle v. King County*, 787 P.2d 907, 911 (Wash. 1990) (discussing a Seattle zoning law that was struck down and contrasts with New York City’s less restrictive approach). In *Presbytery*, the owner of a 4.5 acre parcel claimed a taking. He claimed that if he subdivided the property, three of the five lots would be unbuildable. *Id.* at 910. The court rejected this approach. *Id.* at 911.

72. *Fred French Investing Co. v. City of New York*, 352 N.Y.S.2d 762, 766 (Sup. Ct. N.Y. County 1973).

73. *Lemp*, 394 N.Y.S.2d at 517.

II. FOUR SPECIAL DISTRICTS DEDICATED TO NATURAL RESOURCE AND OPEN SPACE PRESERVATION

A. *Special Hillside Preservation District*

This overlay zone covers 1,900 scenic acres in the northern hills of Staten Island, New York City's southernmost borough.⁷⁴ This area of single-family homes on quarter and half acre parcels presents a stark contrast to the majestic towers of Manhattan that lie across New York Harbor. Development pressure on this area led to the creation of the Hillside District.⁷⁵ Its goals are to prevent erosion, preserve aesthetic qualities and outstanding natural beauty, and maintain neighborhood character.⁷⁶

The basic scheme of the District is to divide the hills into three tiers.⁷⁷ Tier I includes slopes of less than 10% grade.⁷⁸ Tier II includes slopes from 10% to 24% grade.⁷⁹ Note that Tier I developments are less stringent than Tier II.⁸⁰ Tier III includes

74. SPECIAL HILLSIDES PRESERVATION, *supra* note 26, at 1.

75. *Id.*

76. *See id.*; *see also* New York, N.Y., Zoning Resolution §§ 119-00(a)–(d) (2001). Goals include:

- (a) to reduce hillside erosion, landslides, and excessive water runoff associated with development, by conserving vegetation and protecting natural terrain;
- (b) to preserve hillsides having unique aesthetic value to the public;
- (c) to guide development in areas of outstanding natural beauty in order to protect, maintain, and enhance the natural features of such areas; and
- (d) to promote the most desirable use of land and to guide future development in accordance with a comprehensive development plan, and to protect the neighborhood character of the district.

Id.

77. *See generally* New York, N.Y., Zoning Resolution (2001).

78. *Id.* § 119-02.

79. *Id.* § 119-01.

80. *Compare id.* § 119-10 (regulating Tier I developments), *with id.* § 119-20 (regulating Tier II developments).

slopes of a 25% grade.⁸¹ All development is prohibited on Tier III slopes except by special permit.⁸² Joined with each of the tiers are regulations concerning tree preservation, erosion control measures, maximum lot coverage and building height.⁸³ The underlying zoning scheme for the Hillside District contains none of these protective measures.⁸⁴ This scheme is distinguished from the steep slope protections in the Special Natural Area Districts (“SNAD”) discussed *infra* Part III.B.⁸⁵ The Hillside regulations designate grades of 25% or more, in contrast to the 15% designated in the SNAD.⁸⁶

The Hillside District contains a variety of zoning classifications, including single family homes, attached houses and apartment complexes.⁸⁷ So long as the basic provisions of Tier I and Tier II regulations are followed, development can proceed as-of-right after approval from the Department of Buildings (“DOB”).⁸⁸ Tier III regulations have the most impact on the underlying zoning because they mandate that the New York City Department of City Planning (“NYCDCP”) approve all development on steep slopes, thus disregarding as-of-right development.⁸⁹

In addition to the specialized regulations relating to these Tiers, the Hillside District also uses strengthened traditional lot controls to minimize the impervious surfaces.⁹⁰ Table A illustrates the theory behind the hillside regulations; that as the grade increases, more of

81. *Compare id.* § 119-10 (regulating Tier I developments), *with id.* § 119-20 (regulating Tier II developments). Note that the term “Tier III” is referred to by the author to mean slopes with a 25% grade.

82. *Id.* § 119-02.

83. *See generally* New York, N.Y., Zoning Resolution §§ 119-113, -313 (2001).

84. *Id.* (implementing these protective measures).

85. *Id.* § 105 (regulating the Special Natural Area Districts).

86. *Compare id.* § 105-11(b), *with id.* § 119-01.

87. SPECIAL HILLSIDES PRESERVATION, *supra* note 26, at 1.

88. *See id.* at 2.

89. Interview with Doug Brooks, N.Y. City Department of City Planning, in Staten Island, N.Y. (Apr. 4, 2000).

90. New York, N.Y., Zoning Resolution § 119-211 (2001). “Impervious surfaces are surfaces that prevent infiltration of water into soil. . . .” Yaggi, *supra* note 20, at 496.

the land's natural drainage and absorption capacity must be preserved. This approach is different from New York City's underlying zoning which relies on minimum lot sizes to control development.⁹¹

Lot Coverage (%) Permitted as the Slope (in % grade) Increases							
NYC Zoning District	R1-1 R1-2	R2	R3-1 R3-2	R4	R5	R6 1-2 Family	Other
Tier 2: 10–14.9 % slope	22.5	22.5	22.5	36	45	48.6	32.4
Tier 2: 15–19.9	20	20	20	32	40	43.2	28.8
Tier 2: 20–24.9	17.5	17.5	17.5	28	35	37.8	25.5
Tier 3: “steep slope”	12.5	12.5	12.5	20	25	27	18

Table A⁹²

As the slope of the parcel increases, the lot coverage permitted by the dwelling unit decreases.⁹³ Denser residential districts, like the R5 attached housing zone, still have more generous lot coverage requirements than the single family R1-1 zone.⁹⁴ But if development is permitted on a steep slope, stricter lot coverage controls are enforced.⁹⁵ Using lot coverage maximums is a departure from New York City's underlying zoning scheme.

91. See generally New York, N.Y., Zoning Resolution § 119-02 (2001) (outlining the Special Natural Area Districts protections).

92. *Id.* § 119-211 (figures derived from information provided in Table I).

93. *Id.*

94. *Id.*

95. *Id.*

1. Tier I

Subject to the special regulations of the overlay zone, development can proceed as-of-right on property of less than a 10% grade.⁹⁶ Trees must be preserved to the "maximum extent possible."⁹⁷ One tree must be planted for every 1,000 square feet of the zoning lot and for each twenty-five feet of street frontage.⁹⁸ Trees play an important role in the Hillside District because they help to prevent erosion. Recent changes to the District have strengthened these protections. In all construction in the Tier I zone, fences must protect areas of "no disturbance,"⁹⁹ builders must submit a tree preservation plan, and all exposed surfaces must be covered with straw, jute matting or geo-textiles.¹⁰⁰ Subdivisions must also present a survey with their application for a building permit, indicating the grade of the parcels, all impervious surfaces (present and planned), and a tree-planting plan from a registered landscape architect.¹⁰¹

2. Tier II

Tier I requirements mirror Tier II with some added protections. For example, controls on new construction require that no construction equipment go beyond fifteen feet from the perimeter of the new building.¹⁰² Vegetation must be fenced off to ensure that it is protected¹⁰³ from construction vehicles that can pack down soil surrounding trees causing quickened death and loss of their erosion-preventing root system.¹⁰⁴

96. See generally *id.* §§ 119-10, -13 (regulating Tier I).

97. New York, N.Y., Zoning Resolution § 119-111 (2001).

98. *Id.* § 119-112.

99. See *id.* § 119-113. These are areas of protection for trees and vegetation. *Id.*

100. *Id.*

101. *Id.* § 119-12.

102. *Id.* § 119-217.

103. New York, N.Y., Zoning Resolution § 119-217 (2001).

104. *Id.*

3. Tier III

No as-of-right development is permitted on lots or portions of zoning lots with a slope of 35% or greater.¹⁰⁵ In an effort to further curb development, a recommendation was recently made to reduce this slope requirement to 25%.¹⁰⁶ Nevertheless, building may continue to proceed with NYCDP authorization.¹⁰⁷ The NYCDP may also grant waivers when development or enlargements are totally precluded by regulations.¹⁰⁸ Without this clause, the Hillside District would have rendered some parcels valueless.¹⁰⁹

B. *Special Natural Area Districts*

There are four SNADs in New York City, existing to guide development around natural beauty; the Central Hills of Staten Island, the Riverdale section of the Bronx, Shore Acres on Staten Island and the Fort Totten section of Queens.¹¹⁰ The Riverdale District was one of the least densely developed neighborhoods in New York City, encompassing rock outcroppings, mature trees, brooks and marshes along the Hudson River.¹¹¹ The Central Hills District is similar with the exception that its natural resources are far more extensive and contained in several preservation areas.¹¹² The Shore Acres District protects a unique spring fed pond and its immediate ecosystem.¹¹³ The Fort Totten District has fewer natural features and exists primarily to preserve scenic open space adjacent to the Long Island Sound.¹¹⁴ Guiding development to prevent erosion and preserve the ecology of New York City's least dense

105. SPECIAL HILLSIDES PRESERVATION, *supra* note 26, at 2.

106. *See id.* at 4.

107. *Id.*

108. *See* New York, N.Y., Zoning Resolution § 119-314 (2001).

109. *See supra* notes 62–71 and accompanying text.

110. *See* New York, N.Y., Zoning Resolution §§ 105-941 to -944 (2001).

111. *Id.* § 105-942.

112. *Id.* § 105-941.

113. *Id.* § 105-943.

114. *Id.* § 105-944.

communities has not only protected these natural features, but also maintained property values and ultimately the City's tax base.¹¹⁵

Special Natural Area District regulations apply broadly to developments, site alterations, subdivisions and public projects.¹¹⁶ They do not apply, however, to existing private homes erected on less than 40,000 square feet.¹¹⁷ This is an important exemption because the regulations impose a significant regulatory burden on landowners.¹¹⁸ It is this exception that has been recently criticized by preservationists and may be eliminated.¹¹⁹

When SNAD regulations do apply, they eliminate as-of-right development, requiring all significant site alterations and new developments to acquire a special permit from the NYCDCP.¹²⁰ This agency must consider the development's effects on rock outcroppings, steep slopes above a 15% grade, aquatic features and botanic environments.¹²¹ To protect SNADs biodiversity, new plantings must be chosen from a list of native vegetation included in the Zoning Resolution.¹²² Other provisions limit the height of buildings and protect erratic rock outcroppings.¹²³

1. How Special Natural Area Districts Function

The most significant feature of the SNAD is elimination of as-of-right development on lots with existing residences above the 40,000 square foot threshold on all new development and subdivisions.¹²⁴ The NYCDCP is given discretion to consider the effect the development will have on the natural environment, especially the natural drainage.¹²⁵ Conversely, the tree planting requirements are

115. *See id.* § 105-944; *see also id.* § 105-944.

116. New York, N.Y., Zoning Resolution § 105-02 (2001).

117. *Id.* § 105-01.

118. *Id.* § 105 (setting forth regulations for landowners).

119. *See* Interview with Doug Brooks, *supra* note 89.

120. *See generally* New York, N.Y., Zoning Resolution § 105-944 (2001).

121. *Id.* §§ 105-41 to -42, -424.

122. *See id.* app. B § 105-00.

123. *See id.* §§ 105-422, -432.

124. *Id.* § 105-01 (excluding lots of 40,000 square feet or less from regulations).

125. *Id.* § 105-421.

mandatory, requiring all developments to plant one four inch caliper tree for every 1,000 square feet of lot area and to preserve all six inch caliper trees.¹²⁶ These regulations are not as stringent as those that apply in the South Richmond Development District (“SRDD”),¹²⁷ where a tree must be planted for every twenty feet of street frontage and for every four parking spaces.¹²⁸ But the difference in the regulations are partly explained by their goals: the SNAD is concerned with erosion and soil stability,¹²⁹ whereas the SRDD’s focus is to maintain the verdant suburban atmosphere of the South Shore of Staten Island.¹³⁰ In both districts, the DOB—the agency that issues building permits—can authorize the removal of trees that are unsafe.¹³¹ These clauses are of concern to community members who feel that the DOB issues such authorizations *pro forma* to all applicants.¹³²

The communities covered by SNADs have also exerted significant pressure on New York City to reduce the density of development permitted, and to adopt the less discretionary steep slope protections of the Hillside District.¹³³ An example of a SNAD regulation that is considered lax is in the Riverdale section of the Bronx. This area consists mostly of single-family homes on large lots.¹³⁴ The Zoning Resolution requires lots of only fifty by one hundred feet (R1-2 zone), which are smaller than the prevailing lot sizes in the community.¹³⁵ This leads to development out of character with the

126. New York, N.Y., Zoning Resolution § 105-30 (2001).

127. See discussion *infra* Part II.D.

128. New York, N.Y., Zoning Resolution § 107-322 (2001).

129. *Id.* § 105-00.

130. *Id.* § 107-00.

131. *Id.* § 107-32.

132. See March Minutes, *supra* note 27. In the meetings of the Task Force for the Special Natural Area District on Staten Island, community members have criticized the City’s under-enforcement of the tree regulations. *Id.*

133. *Id.*

134. SACCARDI AND SCHIFF, INC. & PARSONS, BRINCKERHOFF, QUADE AND DOUGLAS, INC., CD8 2000: A RIVER TO RESERVOIR PRESERVATION STRATEGY, 111-13 to -14 (2000) [hereinafter COMMUNITY BOARD 8] (a 197-a Community Plan for Bronx Community District 8).

135. *Id.*

surrounding community.¹³⁶ Community members want the Riverdale SNAD to mandate development that conforms with the existing structures in the area. Part III of this Article discusses the density reducing proposals being called for in the Bronx and Staten Island.¹³⁷

2. Modifications for Landowners

Certain provisions exist to permit development in sensitive areas. In the steep slope areas of the SNADs, the NYCDCP may permit clustering homes in the portion of a lot that least disturbs the environment.¹³⁸ By increasing the density permitted in only one part of the tract, the NYCDCP may modify the lot area per dwelling unit requirement to preserve the steep slope area in their natural state.¹³⁹ Note that the lot area required for each unit is not reduced, instead the units are clustered in only one area of the land.¹⁴⁰ Further, doubling the maximum lot requirement allows developers to avoid the regulations and build homes on one half acre in an R1-1 zone.¹⁴¹ However, it has been suggested that higher penalties for violations and performance bonds for new construction within the SNAD be required by the text.¹⁴² Additionally, it has been recommended that the text require "No Development Zones" within the SNAD, similar to those provided for in the South Richmond District.¹⁴³

C. *The Waterfront*

"The comprehensive plan capitalizes on the size and diversity of [New York] City's waterfront to address the historic competition between commerce and recreation for use of waterfront land."¹⁴⁴

136. *See id.*

137. *See discussion infra* Part III. *See generally* Minutes, Natural Area District Task Force (Mar. 9, 2000) (on file with the *Fordham Environmental Law Journal*).

138. New York, N.Y., Zoning Resolution § 105-50(1) (2001).

139. *Id.*

140. *Id.*

141. *See id.*

142. *See* March Minutes, *supra* note 27.

143. *Id.*

144. COMPREHENSIVE WATERFRONT PLAN, *supra* note 3, at 2.

1. Competition for Land in Waterfront Areas

In 1982, New York City became the first municipality within the state to submit a Waterfront Revitalization Plan pursuant to New York State's Waterfront Revitalization and Coastal Resource Act¹⁴⁵ and the federal Coastal Zone Management Act.¹⁴⁶ The goals of the plan are to foster a wide array of waterfront projects, including parks, open space, natural areas protection, as well as promote housing and employment opportunities.¹⁴⁷ Pursuant to this plan, New York City created three Special Waterfront Areas, which represent the last three intact waterfront ecosystems in the City.¹⁴⁸

A dilemma developed as New York City's traditional working waterfront declined, leaving vast stretches derelict.¹⁴⁹ In 1961, when the last zoning amendments were enacted, large segments of the waterfront were actively industrial.¹⁵⁰ Since then, there has been a 75% loss of manufacturing.¹⁵¹ The City's share of New York Harbor's cargo has dropped from 75% to 15%,¹⁵² with New Jersey facilities now handling the bulk of the cargo entering the harbor.¹⁵³ The Comprehensive Waterfront Plan enacted in 1992 mandates a

145. See N.Y. EXEC. LAW § 915-(1) & (3) (McKinney 2001).

146. See N.Y. CITY DEP'T OF CITY PLANNING, THE NEW WATERFRONT REVITALIZATION PROGRAM: A PROPOSED 197A PLAN 1, 3 (1999) [hereinafter WATERFRONT REVITALIZATION]. New York State approved the original plan in 1982. See *id.* at 4.

147. COMPREHENSIVE WATERFRONT PLAN, *supra* note 3, at i. "The plan envisions a 21st Century Waterfront . . ." including parks, open spaces, fishing, swimming, natural areas, maritime industries, ferries, scenic views, housing and job opportunities. *Id.*

148. These are not "Special Districts" in the Zoning Resolution, but are recognized by City Planning. *Id.* at 35 (using three special districts: Jamaica Bay/Rockaway Peninsula, Portions of Staten Island Coastline and sections of the Long Island Sound Shoreline of Queens and the Bronx).

149. See *id.* at i.

150. See *id.* at 145.

151. See *id.* at 85.

152. *Id.*

153. See COMPREHENSIVE WATERFRONT PLAN, *supra* note 3, at 85.

balance between protection of the coastal environment and the promotion of remaining industries, such as ports.¹⁵⁴

Environmental and industrial demands must also compete with renewed residential development. Increased water quality conditions and better sewage treatment should generate a renewed interest in building on the coastline.¹⁵⁵ While some 40% of the coastline consists of public park land,¹⁵⁶ New York City has actually lost the vast majority of its coastal ecosystems to development.¹⁵⁷ Of the 224,000 acres of freshwater wetlands that originally existed, only 3,000 remain.¹⁵⁸ Of the 16,000 acres of tidal wetlands that existed in the unique Jamaica Bay area of Queens, only 4,000 remain.¹⁵⁹ Another outgrowth of cleaner waters has been a renewed commitment to provide public access to the waterfront, as evidenced by the stringent requirements placed on all new developments within the SRDD.¹⁶⁰

Competing with these various interests are the three Special Natural Waterfront Areas ("SNWA") created to protect the remaining "whole" coastal ecosystems on New York City's 578 mile waterfront.¹⁶¹ Overall, as-of-right development in the 300 foot coastal zone is not affected.¹⁶² Only when a developer must obtain

154. *See id.* at i.

155. *See id.* at 26.

156. WATERFRONT REVITALIZATION, *supra* note 146, at 51.

157. *See id.* at 18.

158. *See id.*

159. *See id.*

160. Zoning lots along Staten Island's Atlantic shore must provide for a waterfront esplanade with public access rights. *See* New York, N.Y., Zoning Resolution, § 107-23 (2001).

161. COMPREHENSIVE WATERFRONT PLAN, *supra* note 3, at iii.

162. WATERFRONT REVITALIZATION, *supra* note 146, at 5. "The waterfront plan covers the following areas of the city: significant maritime and industrial areas; significant coastal fish and wildlife habitats; 'Special Natural Waterfront Areas'; Staten Island Bluebelts; Tidal and Freshwater Wetlands; Coastal Floodplains and Flood Hazard Areas; Erosion Hazard Areas; Coastal Barrier Resources Act Areas; steep slopes; parks and beaches; visual access . . . ; historical . . . sites . . . ; special zoning districts and the area within 300 feet of the Mean High Tide Line when these special

NYCDCP approval anyway, do the considerations of the Waterfront Revitalization Plan (“WRP”) become mandatory.¹⁶³

The considerations that apply to the SNWAs were recently updated and revised from the 1992 plan in “The New Waterfront Revitalization Program.”¹⁶⁴ They guide the NYCDCP in the approval process for uses that are not as-of-right.¹⁶⁵ Generally, the policies call for a balanced approach to development, preserving industrial uses, expanding recreation, and respecting the integrity of significant natural features.¹⁶⁶

features aren’t present.” COMPREHENSIVE WATERFRONT PLAN, *supra* note 3, at i.

163. “Discretionary” in New York City means approvals subject to the Uniform Land Use Review Procedure, CEQR, variance proceedings and 197-a plans. Each of the above must be reviewed for consistency with the WRP. WATERFRONT REVITALIZATION, *supra* note 146, at 4.

164. *Id.* at 7–8, 16–17 (discussing why the SNWA’s were updated and what the new polices are with respect to those areas).

165. *See id.* at 3.

166. The “policies” are:

- (1) Support and facilitate commercial and residential redevelopment in areas well-suited to such development.
- (2) Support water-dependent and industrial uses in New York City coastal areas that are well-suited to their continued operation.
- (3) Promote use of New York City’s waterways for commercial and recreational boating and water-dependent transportation centers.
- (4) Protect and restore the quality and function of ecological systems within the New York City coastal area.
- (5) Protect and improve water quality in the New York City coastal area.
- (6) Minimize loss of life, structures and natural resources caused by flooding and erosion.
- (7) Minimize environmental degradation from solid waste and hazardous substances.
- (8) Provide public access to and along New York City’s coastal waters.

Following this reasoning the WRP could be considered an overlay zone if it is completely integrated with the Zoning Resolution. Presently, the WRP is simply a guidance document for the NYCDCP, and is mandated only when a variance or non as-of-right process occurs.¹⁶⁷ Only a few provisions of the WRP are reflected in the Zoning Resolution. For example, in the 300 foot wide "coastal zone," in R1-1 and R1-2 zones, density is capped at 35% lot coverage and a .5 Floor to Area Ratio ("FAR").¹⁶⁸ Height is also limited to thirty-five feet.¹⁶⁹ These provisions, however, have been incorporated into the zoning resolution, and have less to do with environmental conservation than with scenic view preservation.¹⁷⁰

2. The Three Special Natural Waterfront Areas

The general goals for SNWAs are to preserve sensitive parcels as park-land and reduce run-off.¹⁷¹ The three areas are Long Island Sound/Upper East River, Staten Island and Jamaica Bay.¹⁷² The Long Island Sound area includes the North Shore of Queens, several islands east of Manhattan, and the eastern shore of the Bronx.¹⁷³ Like the other two areas, it is dominated by publicly owned land, low-density residential development and some industrial pockets.¹⁷⁴

The Staten Island area is sometimes called the "Harbor Herons Complex" because it is home to a surprisingly large bird population.¹⁷⁵ This area is important, not just as a bird sanctuary, but

(9) Protect scenic resources that contribute to the visual quality of the New York City coastal area.

(10) Protect, preserve and enhance resources significant to the historical, archaeological and cultural legacy of the New York City coastal area.

Id.

167. *Id.* at 4, 8.

168. *See* New York, N.Y., Zoning Resolution § 62-322 (2001).

169. *Id.* § 62-341(b)(1)(i).

170. Dunlap, *supra* note 22, at 11-1.

171. COMPREHENSIVE WATERFRONT PLAN, *supra* note 3, at 49.

172. *Id.* at 35.

173. *See id.* at 45.

174. *Id.*

175. *See id.* at 42.

also because the wetlands filter stormwater.¹⁷⁶ The decline of industrial waterfront uses has been a boon for the migratory bird population.¹⁷⁷ For example, Shooter's Island, zoned for manufacturing, has recently been acquired as a bird sanctuary by New York City.¹⁷⁸ This acquisition demonstrates that while the concerns of the SNWAs have not been incorporated into the Zoning Resolution, New York City has slowly acquired the most sensitive parcels.¹⁷⁹

The Jamaica Bay SNWA is the most intact coastal ecosystem of the three, and the surrounding uplands are largely publicly owned.¹⁸⁰ Development in this special area has led to a severe stormwater run-off problem.¹⁸¹ Leachate¹⁸² from landfills pollutes the water, and the John F. Kennedy ("JFK") Airport's run-off fouls the water in the Eastern Bay.¹⁸³ The NYCDCP must consider, in its discretionary approvals, the need to maintain buffers for non-point source pollution, wetland preservation, and mitigating the effects of JFK Airport when discretionary zoning requests arise.¹⁸⁴

D. *The South Richmond Development District*

Of all the five boroughs, Staten Island contains the most open space and the least dense housing.¹⁸⁵ The goal of the South Richmond Development District ("SRDD") is to promote "balanced" growth, while avoiding destruction of irreplaceable natural and recreational resources.¹⁸⁶ This overlay zone supplements

176. *See id.*

177. COMPREHENSIVE WATERFRONT PLAN, *supra* note 3, at 42.

178. *See id.*

179. *Id.*

180. *Id.* at 36; *see also*, N.Y. CITY DEP'T OF CITY PLANNING, WATERFRONT REVITALIZATION PROGRAM, COASTAL ZONE BOUNDARY (1997) [hereinafter COASTAL ZONE BOUNDARY] (referencing the appendix).

181. COMPREHENSIVE WATERFRONT PLAN, *supra* note 3, at 38.

182. *Id.*

183. *See id.*

184. *See id.* at 39.

185. *Id.* at 42.

186. New York, N.Y., Zoning Resolution § 107-00(a)-(d) (2001) (stating that the general goals of the SRDD are to "guide future

the existing zoning, eliminating as-of-right development for subdivisions and other development with “designated open space,” and by implementing yard size modifications, prohibiting the use of non-native planting material, and guiding development along the designated waterfront esplanade.¹⁸⁷

A general purpose of the SRDD, unlike the Hillside District, is to preserve open space for aesthetic purposes, as well as preserve natural flood drainage capacity.¹⁸⁸ To this end, the SRDD incorporates several unique zoning tools, including designated open space and a waterfront esplanade.¹⁸⁹ Traditional open space techniques are also incorporated, including minimum lot sizes, space between homes and minimum set backs.¹⁹⁰

1. The Waterfront Esplanade

New York City is creating a waterfront esplanade for several miles along the Atlantic coast of Staten Island, with right of public access.¹⁹¹ The NYCDCP must certify a waterfront lot owner’s waterfront esplanade plan to be built and maintained by that private owner.¹⁹² To make sure the esplanade is built, a \$400 bond must be posted with the City for each 100 square feet of esplanade required, and a \$200 bond for a pedestrian access way to the waterfront.¹⁹³

development . . . promote balanced land use . . . avoid destruction of irreplaceable natural and recreational resources such as lakes, ponds, watercourses, beaches and natural vegetation and . . . to promote the most desirable use of the land . . . and thereby protect the City’s tax revenues”).

187. *Id.* § 107-50.

188. *Id.* § 107-00.

189. *Id.* §§ 107-22, -23.

190. *Id.* §§ 107-42, 107-46, -662.

191. See discussion *infra* Part III. See generally Inbar, *supra* note 1 (discussing the problems inherent in requiring private landowners to create public shore-front access).

192. New York, N.Y., Zoning Resolution § 107-23 (2001).

193. See *id.* § 107-24.

2. Open Space

Several zoning techniques are used in the SRDD to preserve open space. Minimum set backs are the most basic provision, requiring a setback of twenty feet from arterial roads, and thirty feet from expressways.¹⁹⁴ In this setback, one tree must be planted for each 400 square feet of land.¹⁹⁵

Lot sizes and coverage are controlled by a special sliding scale.¹⁹⁶ These controls preserve the aesthetic characteristics of communities by increasing the required lot width as the height of the home increases.¹⁹⁷ For example, a detached home in an R1-2 zone must have a minimum lot size of 5,700 square feet, and a lot width of forty feet assuming it is two stories tall.¹⁹⁸ For a three and four-story home, the lot width increases to fifty and sixty feet respectively.¹⁹⁹ These sliding scales control bulk and density in all residential zones.²⁰⁰

The most unique open space preservation technique is the Designated Open Space (“DOS”) network, which consist of land to be preserved in its natural state whether publicly or privately held.²⁰¹ The DOS network may count as lot area, and may be used to meet the minimum lot area requirements for a dwelling unit.²⁰² Zoning guidelines regulate building by homeowners on DOS areas.²⁰³ When all reasonable development is precluded, an owner may request that the City exchange the land for a city owned parcel.²⁰⁴ The

194. *See id.* § 107-251(b).

195. *See id.*

196. *See generally id.* tbl. A § 107-00.

197. *Id.* § 107-41 to -42.

198. New York, N.Y., Zoning Resolution § 107-00 tbl. A (2001).

199. *See id.*

200. *See generally id.* §§ 107-223 to -226.

201. *Id.* § 107-01 (definitions for the SRDD).

202. *Id.* § 107-224.

203. *See generally id.* §§ 107-225.

204. Pursuant to the New York City Zoning Resolution, the City may exchange parcels or it may modify the rules to allow some encroachment on the open space. New York, N.Y., Zoning Resolution § 107-226 (2001).

boundaries of the swaths of open space can also be altered to permit development, but never closer than sixty feet from a watercourse.²⁰⁵

3. Tree Preservation

The third component of the SRDD is its tree regulations; an important component of the SNAD and Hillside District.²⁰⁶ Regulating the removal and planting of trees is another form of screening development.²⁰⁷ Such screening includes mandating one tree for every four parking spaces, and a four-foot high dense evergreen screen for parking areas of ten or more cars screens development of parking areas.²⁰⁸ When a residential area abuts a commercial or manufacturing district, a six-foot high evergreen buffer must be maintained by the developer, regardless of whether it is a commercial or residential site.²⁰⁹ In general, the DOB must approve the removal of all large trees, and builders who do not comply will lose their building permit.²¹⁰ To re-obtain the permit, developers must post a bond to assure restoration of the land.²¹¹

205. *See id.* § 107-21.

206. *Id.* § 107-32.

207. *See generally id.* §§ 107-07, & -321 to -322.

208. *See id.* § 107-322.

209. *See id.* §§ 107-481 to -482. The rules suggest that a developer building residences near a commercial or manufacturing area is responsible for the buffer and vice-versa. *Id.*

210. New York, N.Y., Zoning Resolution § 107-321 (2001).

211. *See id.*; *see also* City of New York v. Delafield 246 Corp., 662 N.Y.S.2d 286, 294-95 (App. Div. 1997) (creating a restoration plan).

III. CHALLENGES AND SOLUTIONS TO THE SPECIAL DISTRICTS' SHORTCOMINGS

“There are so many loopholes to the rules, some are big enough to drive a bulldozer through.”²¹²

Inadequate protections, unclear rules and under-enforcement has led to a considerable uproar with the special districts of the Bronx, Staten Island and Queens.²¹³ In response to the criticisms and challenges, the Hillside District’s landscape protections were made more stringent.²¹⁴ Changes are currently underway for SNAD areas.²¹⁵ Finally, the purposes of the three SNWAs have been frustrated by New York City’s failure to incorporate them into the Zoning Resolution.²¹⁶

A. *Revising the Hillside District Protections*

The catalyst for the revisions to the Hillside District was a proposed development that would have resulted in nineteen townhouses per acre.²¹⁷ Community members cried foul play and a grand jury was impaneled to investigate the process of obtaining a building permit.²¹⁸ Through 1997, the grand jury heard testimony from nineteen witnesses who testified about the process of obtaining

212. Jim O’Grady, *Hills, Trees, and Maybe a New Park*, N.Y. TIMES, July 18, 1999, § 14 (The City Desk), at 8 (citing a disgruntled community leader describing the Hillside District later revised to address some of these concerns).

213. See generally *supra* note 27 and accompanying text.

214. O’Grady, *supra* note 212, at 8.

215. Minutes, Natural Area District Task Force (Jan. 29, 2000) (on file with the *Fordham Environmental Law Journal*).

216. See generally New York, N.Y., Zoning Resolution (2001). The Zoning Resolution does not include these special districts.

217. See O’Grady, *supra* note 212, at 8.

218. See Grand Jury Report at 1, *In re* Grand Jury Investigation Into the Zoning District Known as the Hillside Preservation District and the New York City Department of Buildings (Sup. Ct. Richmond County 1997) (submitted by the foreman to Judge Rooney).

building permits in the Hillside District.²¹⁹ Even the NYCDCP's own study found the District's rules and enforcement in the District inadequate.²²⁰ Ideally, the process for obtaining a building permit should work as follows: an application should be filed with the DOB containing plans drawn up by a licensed architect;²²¹ the plan should be reviewed for 6 to 8 weeks for conformity with both the underlying and overlay zoning.²²² Only when the plans are in order, should a building permit be issued.²²³

A grand jury found that the Hillside District implemented a self-certification process that allows architects to bypass the stricter scrutiny that would normally be performed by the DOB.²²⁴ This process is not properly overseen by any government officials.²²⁵ The grand jury criticized the as-of-right development that proceeds in contrast to the SNAD and SRDD.²²⁶ "Expediters" were hired by developers to steer the plan through the DOB, therefore tainting the process.²²⁷ In addition to rectifying the aforementioned problems, the NYCDCP was called upon to create a uniform system of site inspections.²²⁸

Hillside districts in other cities have suffered from inadequacies very different from those faced in New York. For example, Seattle created a 900 acre hillside district that required 70% of any 5,000 square foot lot to be preserved.²²⁹ A Washington court found that homeowners could scarcely make use of the property and rejected

219. *Id.*

220. SPECIAL HILLSIDES PRESERVATION, *supra* note 26, at 3.

221. *See* Grand Jury Report at 2 (Sup. Ct. Richmond County 1997).

222. *See id.* at 6.

223. *Id.* at 3.

224. *See id.*

225. *See id.*

226. *See id.* at 3-4

227. *See* Grand Jury Report at 5, *In re* Grand Jury Investigation Into the Zoning District Known as the Hillside Preservation District and the New York City Department of Buildings (Sup. Ct. Richmond County 1997).

228. *See id.* at 6. Unfortunately, the report's drafters failed to realize that the DOB conducts site inspections.

229. *See* Allingham v. City of Seattle, 749 P.2d 160, 162 (Wash. 1988).

the City's argument that they were merely restricting the use of part of the property.²³⁰ The Supreme Court of Washington, however, later reversed itself in *Presbytery of Seattle v. Kings County*.²³¹ The latter court's decision found that a landowner could not divide his property and then claim complete loss of value on one portion.²³²

In contrast, when the Arizona municipality of Scottsdale, created a Hillside Conservation area that prevented development of 3,836 acres of a 4,800-acre parcel, the court found a taking under both the state and federal constitutions.²³³ At least 74% of the land would be mandated open space.²³⁴ The revised hillside regulations call for 12.5% lot coverage on steep slopes, if the NYCDGP specially permits such development.²³⁵ While resulting in similar "no-build" percentages, however, the Scottsdale and New York City laws take a different approach. Scottsdale, for example left thousands of acres undeveloped.²³⁶

The New York City Hillside District, on the other hand was considered too lenient, and thus several important protections were added.²³⁷ The most important protection is that a steep slope is now classified as a 25% slope.²³⁸ As noted *supra* discussion III.A, if development is permitted at all, it can cover only 12.5% of the 12,500 square foot lot, thus maintaining the stability of the hills.²³⁹ In the Tier II areas, a fifteen-foot buffer zone must be left and vegetated at the crest of a steep slope.²⁴⁰ Tree preservation and other

230. *Id.* at 163.

231. *Presbytery of Seattle v. King County*, 787 P.2d 907, 915 (Wash. 1990).

232. *Id.*

233. *Corrigan v. City of Scottsdale*, 720 P.2d 513, 514 (Ariz. 1986).

234. *Id.*

235. *See* New York, N.Y., Zoning Resolution § 119-211 tbl. I (2001).

236. *See generally Corrigan*, 720 P.2d at 513.

237. *See* SPECIAL HILLSIDE PRESERVATION, *supra* note 26 at 3-4.

238. *See* New York, N.Y., Zoning Resolution, § 119-01 (2001).

239. *See* March Minutes, *supra* note 27.

240. *See* SPECIAL HILLSIDES PRESERVATION, *supra* note 26, at 4. Recommended in SPECIAL HILLSIDES PRESERVATION, *supra* note 26 and implemented in § 119-02 of the New York City Zoning Resolution.

erosion control measures must also be added.²⁴¹ However, the exemptions granted to publicly assisted housing developments and senior citizen housing have been eliminated.²⁴²

B. *Changes in the Natural Area Districts*

Apparently the changes to the Hillside District have been successful because both communities covered by the Bronx and Central Staten Island Natural Area Districts are eager to incorporate some of its provisions.²⁴³ Note that the changes currently being called for largely mirror those called for, but never implemented in 1983.²⁴⁴ A 1983 NYCDCP report suggested reducing the permitted density of development on portions of Staten Island's SNAD by increasing minimum lot size in the underlying zoning scheme.²⁴⁵ This study emphasized the need for conservation and proposed a Model Conservation Easement form that limited the use of the protected property to "agriculture, forestry, non-commercial recreation and open space purposes only."²⁴⁶ Finally, Staten Islanders have repeatedly expressed frustration about the languid pace at which these concerns have been addressed.²⁴⁷ Additional concerns are the de-mapping of the Richmond Expressway, which has yet to be completed after thirty years.²⁴⁸ A particularly

241. *See, e.g.*, New York City Zoning Resolution § 119-216 (2001) (requiring that larger trees be planted to replace those removed); *see also id.* § 119-22 (requiring a drainage plan for all development in Tier II).

242. *See id.* § 119-211.

243. *See generally* March Minutes, *supra* note 27 (discussing implementation of Special Natural District Areas zoning provisions).

244. N.Y. CITY DEP'T OF CITY PLANNING, THE STATEN ISLAND GREENBELT STUDY: FINAL REPORT 65-66 (1983) [hereinafter STATEN ISLAND GREENBELT].

245. *Id.*

246. *Id.* at 80.

247. *See generally* Minutes, Natural District Area Task Force (Feb. 5, 2000) (on file with the *Fordham Environmental Law Journal*).

248. This issue was raised by a community member at the Task Force meeting held on March 20, 2000. *See generally* March Minutes, *supra* note 27. Removing the Expressway from city maps would mean the project was formally negated.

interesting response to community frustration has been the proposal to create a private right of action to enforce the SNAD provisions.²⁴⁹

C. *Maintaining a Balance in the Coastal Zone*

The 1992 Comprehensive Waterfront Plan noted that the “success of the plan will rest in large part on adoption of the proposed zoning text . . . as modified after public review and discussion.”²⁵⁰ Yet, the SNWAs have not been incorporated into the New York City Zoning Resolution.²⁵¹ Two plausible reasons for this is that they need less protection from development since they consist largely of mapped parkland,²⁵² or New York City recognizes its need to ensure retention of sufficient land, zoned for manufacturing, to accommodate future needs.²⁵³ Greater protections for the special waterfront areas might jeopardize current water dependent industries in the future.²⁵⁴ This conflict of interest is amply demonstrated in the City’s Revised Waterfront Revitalization Plan, which calls for increased commercial and residential development, as well as protection and restoration of the coastal ecosystems.²⁵⁵

IV. ENFORCEMENT PROBLEMS

Citizens and public officials involved with the Special Districts agree that lack of enforcement is the greatest threat to the Districts’ success.²⁵⁶ The NYCDCP and the DOB rely on citizen complaints to

249. *See id.*

250. *See* COMPREHENSIVE WATERFRONT PLAN, *supra* note 3, at 185.

251. *See generally* New York, N.Y., Zoning Resolution (2001).

252. *See* COMPREHENSIVE WATERFRONT PLAN, *supra* note 3, at 36.

253. *Id.* at vi.

254. *See id.*

255. *See* WATERFRONT REVITALIZATION, *supra* note 146, at 11, 16.

256. *See* Interview with George Bramwell, Chair of the Task Forces for the Hillside Preservation and Special Natural Area Districts on Staten Island, in Staten Island, N.Y. (Apr. 13, 2000) (conducted at New York City Councilman Jerome O’Donovan’s office); *see also* Interview with Doug Brooks, *supra* note 89; Interview with Terrence Lin, New York City Department of

bring attention to violations.²⁵⁷ In fact the DOB considers the District regulations complex and too tedious to enforce.²⁵⁸

The primary cause of the enforcement problems is lack of inspectors.²⁵⁹ In 1999, the DOB had only five inspectors monitor the construction of 2,262 new housing units in on Staten Island, which has a population of 400,000.²⁶⁰ To deal with this problem the DOB has resorted to “self-certification.”²⁶¹ This process allows builders and architects to certify that their developments comply with District regulations, based on a licensed professional inspection ensuring that the project conforms with the law.²⁶² With only five inspectors, the complexity of implementing regulations is overwhelming. For example, the tree cutting regulations permit trees to be removed in Natural Area Districts only if they are hazardous or dying, a subjective decision that is beyond the skill of the DOB.²⁶³ Another example is the school seat restriction in South Richmond—one of the innovative ways the SRDD limited development.²⁶⁴ The NYCDCP allows development only if there are adequate school seats to accommodate the new residents.²⁶⁵ A recent court ruling, however, found that the NYCDCP must release the development

Buildings, in Staten Island, N.Y. (Apr. 28, 2000); email from Mike Gerrard, Arnold & Porter, to Chris Rizzo, Cole, Schotz, Meisel, Forman & Leonard (Apr. 21, 2000, 21:44 EST) (on file with the *Fordham Environmental Law Journal*).

257. See Interview with Doug Brooks, *supra* note 89.

258. See Interview with Terrence Lin, *supra* note 256.

259. *Id.*

260. *Id.*; see also Karen O’Shea, *Gentlemen, Start Your Bulldozers: Green Light for 1,300 Homes*, STATEN ISLAND ADVANCE, May 1, 2000, at A1.

261. Interview with Terrence Lin, *supra* note 256.

262. See Grand Jury Report at 3, *In re Grand Jury Investigation Into the Zoning District Known as the Hillside Preservation District and the New York City Department of Buildings* (Sup. Ct. Richmond County 1997). Compounding the problem is that there is no review process for the self-certifications. See *id.* at 4. Terrence Lin at the DOB says, however, that 20% are audited randomly. See Interview with Terrence Lin, *supra* note 256.

263. *Id.*; see also Minutes, *supra* note 247.

264. *Id.*

265. See New York, N.Y., Zoning Resolution § 107-123 (2001).

permits when a new school is proposed, not when the school seats are actually available.²⁶⁶ Therefore, homes can be built before the school capacity actually exists.²⁶⁷ By appealing this ruling, the City has cleared the way for 1,300 new homes on the south shore of Staten Island.²⁶⁸ These homes will be built independent of DOB pressure on the schools.²⁶⁹

An important solution to these problems is to eliminate as-of-right development in the Districts.²⁷⁰ The NYCDCP, more adept at enforcing its own regulations than the DOB, would need to review all significant developments.²⁷¹ A 1997 Grand Jury Report also called for the elimination of self-certification; a step not taken due to lack of inspectors.²⁷² Finally, some community members have called for a citizen suit provision that would help compensate the lack of enforcement and inspection capacity within the City government itself.²⁷³

CONCLUSION

New York City's public transportation system and concentration of services makes it an ideal place for high densities.²⁷⁴ However this logical theory of planning disregards existing community concerns about preserving community character and open space.²⁷⁵ This has led to urgent movements by neighborhoods to "down-zone,"

266. See O'Shea, *supra* note 260, at A1, A4.

267. *Id.* at A4.

268. See *id.* at A1.

269. See *id.* at A4.

270. Grand Jury Report at 7, *In re* Grand Jury Investigation Into the Zoning District Known as the Hillside Preservation District and the New York City Department of Buildings (Sup. Ct. Richmond County 1997).

271. See *id.*

272. See Grand Jury Report at 2 (Sup. Ct. Richmond County 1997); see also Interview with Terrence Lin, *supra* note 256.

273. See March Minutes, *supra* note 27.

274. See email from Mike Gerrard to Chris Rizzo, *supra* note 256.

275. See Robert J. Blackwell, *Overlay Zoning, Performance Standards & Environmental Protection After Nollan*, 16 B.C. ENVTL. AFF. L. REV. 615 (1989).

reducing the permitted densities within their communities.²⁷⁶ The Districts discussed in this Article have had some measure of success in preserving critical natural features, while permitting higher densities than those allowed in a typical suburban community. However, the district approach leaves out natural features found elsewhere in the City. There are wetlands and hillsides that need to be protected outside the narrow confines of the districts. The district approach also disregards two important and innovative tools of environmental protection; large-scale clustering to preserve open space and conservation easements. These tools would permit developers and institutional landowners to realize the value of their land. New York City would simultaneously protect natural areas and open space with greater success. With greater use of innovative land use protections and a renewed emphasis on enforcement, the special districts can actually “guide development in areas of outstanding natural beauty.”²⁷⁷

276. *See generally id.*

277. *See* New York, N.Y., Zoning Resolution § 105-00 (2001).