

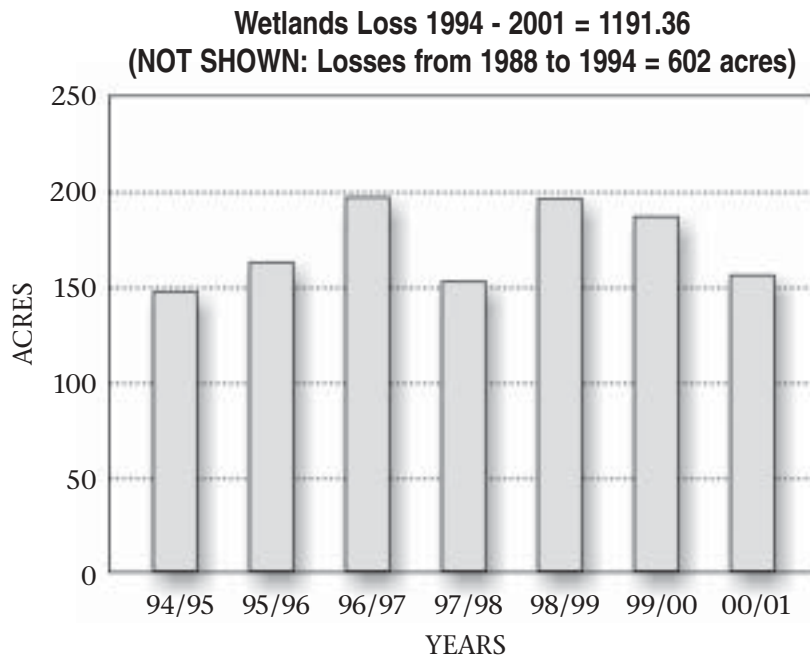
Chapter VIII



Municipal Land Use Law and the Freshwater Wetlands Act

Despite New Jersey's strong wetlands law and regulations, wetlands are still being lost through the DEP permit process. From 1988 to 2001, the annual DEP reports to EPA show that 1,793.3 acres have been lost due to permit activity, an average of about 138 acres a year.

TOTAL LOSS 1988 to 2001 - 1,793.3 Acres



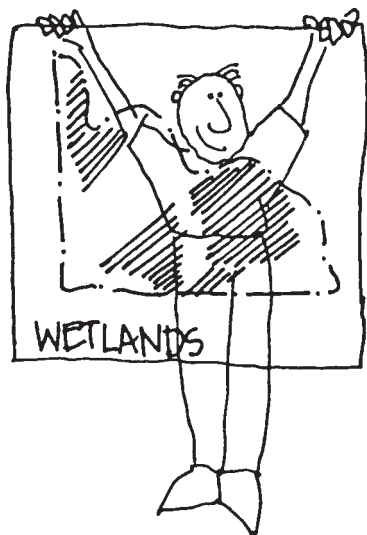
Total Acreage lost does not include losses due to violations.

Municipalities, with their land use responsibility, are in an excellent position to help reduce the loss of wetlands. Municipal officials can provide wetlands protection through their land use control powers as defined by the Municipal Land Use Law (NJ.S.A. 40:55D-1 et. seq.). This chapter outlines ways municipalities can use the local land use planning and development review process to protect wetlands, including ordinance checklists and other local regulatory options. It also offers suggestions for coordinating the local and state review processes.

LAND USE IN NEW JERSEY

Since New Jersey municipalities control land use, they have many opportunities to take actions that will complement the state's Freshwater Wetlands Act.

The Municipal Land Use Law (MLUL) delegates control of land use in New Jersey to municipal government. The provisions of the MLUL are intended to promote appropriate use or development of all lands in the state in a manner that will protect the public health, safety and welfare.



Although the state wetlands law preempts municipalities from regulating wetlands, it does not supersede the provisions of the MLUL requiring municipalities to designate appropriate uses and densities for land.

WETLANDS, THE MUNICIPAL ENVIRONMENTAL RESOURCE INVENTORY, MASTER PLAN AND ZONING

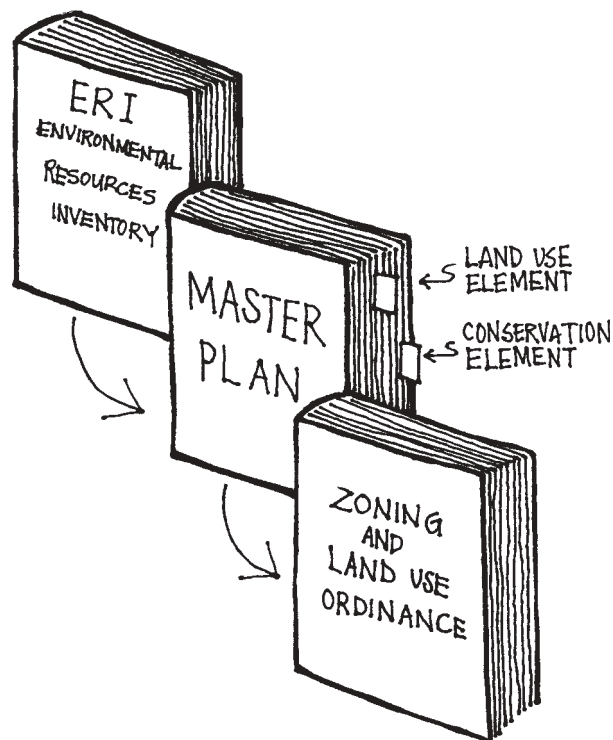
The municipal master plan should provide a sound basis for zoning and the zoning ordinance. The MLUL charges planning boards with the job of preparing, adopting, and/or amending master plans to determine appropriate uses for lands in the municipality.

A master plan's land use element identifies appropriate areas for development as well as for protection based on the physical character of the municipality. An **environmental resource or natural resource inventory** can be a source document for the master plan or can be adopted as part of it. The inventory identifies soils, geology, topography, forests, rivers, wetlands, floodplains, and other physical characteristics that the municipality should consider in its land use planning and decision making. It also serves as the basis for a conservation element, which uses the town's physical character to develop goals and strategies for preservation and conservation of natural resources. Much of this information is available from DEP as downloads from www.dep.state.nj/gis which include: wetlands, floodprone areas, topography, soils, contaminated sites, recharge soils, and landscape

area classes from the Landscape Project which identifies habitat classes for potential location of rare species in New Jersey.

With information on hydric and poorly drained soils shown on the County Soil Survey maps, or state freshwater wetlands maps, the environmental resource inventory and the master plan's land use maps can show generally where wetlands are located and designate uses for them consistent with their environmental sensitivity. Conservation elements and greenways, stream corridors, or open space plans can also identify wetlands and suggest strategies for their protection.

Once the planning board has adopted a master plan land use element, the MLUL gives the governing body the power to designate uses for different zones in the municipality and to enact or amend a zoning ordinance that provides regulations for each zone district. The zoning ordinance must be consistent with the Master Plan (NJ.S.A. 40:55D - 62a). It describes legally permitted land uses and densities for different districts and provides the planning board and the board of adjustment with rules for development review in those zones. Zoning designations for wetlands areas, based on the master plan land use and conservation elements, can provide for low intensity use, e.g., large lot zoning or cluster provisions to avoid wetland areas.



LOCAL PLANNING, ZONING AND OTHER STATE PROGRAMS

Local control of land use planning and zoning gives municipal government opportunities for wetlands protection not available to the state. At the same time, local planning and zoning are the basis for many state programs and can promote protection of freshwater wetlands.

For example, state water quality planning and associated wastewater management planning prohibit providing sewer service to wetlands and other environmentally critical areas. Local planning and zoning should reflect these constraints.

The State Development and Redevelopment Plan's goal is to manage the state's growth largely through coordination of state agency and local land use planning. The State Plan sets several statewide goals and policies and recommends areas for growth and limited growth in an attempt to balance future development with protection of natural resources, including freshwater wetlands. The Plan's Planning Area system divides the state into five regions, each with different development characteristics. The Plan's regional design system creates objectives for development within these regions.

Planning Area 4B and 5 consist of undeveloped areas where growth must be carefully managed to protect environmentally sensitive features. The Plan encourages local government to map these features and establishes strategies for their protection. Since Planning Area 4B and 5 criteria designate freshwater wetlands systems as one of the areas for protection, local governments should identify them for the State Planning Commission if the State Plan Map did not.

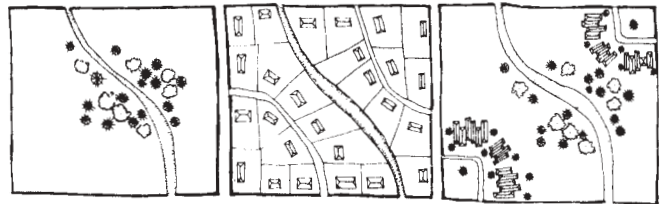
MUNICIPAL LAND USE AND ZONING REGULATIONS

The Freshwater Wetlands Protection Act does not preempt ordinances with a general purpose that incidentally protect wetlands.

The land use and zoning ordinances can promote wetlands protection. The land use regulations detail requirements and standards for subdivision and site plan review. The zoning ordinance establishes regulations by which municipal boards regulate development in different zoning districts.

The Freshwater Wetlands Protection Act does not preempt ordinances with a general purpose that incidentally protect wetlands. The following ordinances and standards can be especially helpful in wetlands protection:

Open space/cluster ordinances or zoning standards enable municipalities to require that a certain percentage of a site be preserved as open space to provide desirable aesthetics and protect natural resources such as wetlands. The concept behind clustering is straightforward -- in exchange for dedicated open space, development is allowed on smaller lots than provided under conventional zoning. The number of units on the site remains the same as could be obtained under the standard zoning. The MLUL requires that an ordinance for residential cluster development shall provide that the open space shall be owned either by an owners' association or by the municipality. Preservation of the open space in perpetuity can be assured by including such a provision in a deed restriction.



UNDEVELOPED
LAND

TRADITIONAL
SUBDIVISION

CLUSTER
DEVELOPMENT

Both the municipality and the developer benefit from cluster developments. A municipality's natural resources are protected and residents are assured of their own open areas. Allowing a developer increased intensity as an incentive for clustering is unnecessary, since benefits are built in. The developer has lower costs for roads, infrastructure and for state permits. By eliminating state regulatory requirements for wetlands and stream encroachments, the developer also saves time and consultant expenses.

Disadvantages of clustering include public perception that open space will be developed even though the open space can be preserved in perpetuity through deed restrictions. Another possible disadvantage is the potential difficulty of providing proper sewage disposal in areas dependent on septic systems, because the smaller building lots may not have enough land area or soil conditions for a leach field that would prevent build-up of nitrates.

Understanding the nature of open space in clustered developments is important. Open space in clustered developments falls into two categories:

1. active open space that provides for recreation and other amenities; and
2. passive open space that:
 - protects sensitive natural resources like wetlands;
 - provides open space connections for wildlife corridors and helps sustain biological diversity;
 - provides stormwater facilities;
 - includes existing easements;
 - includes roads.

Non-contiguous zoning ordinances enabled under state law, allow cluster development on noncontiguous lands under common ownership. For example, density can be concentrated on one parcel while the noncontiguous parcel remains preserved as open space.

Lot-size averaging ordinance provisions (MLUL 40:55D-40(b)) enable municipalities to provide design flexibility for subdivision layout to promote resource protection. The concept allows the planning board to approve some lots in a subdivision to be less than the standard minimum lot size, provided that other lots are larger than the minimum and conform to the overall intent of the zoning. Municipalities should consider limiting the size of structures since the larger lots will accommodate larger houses. Lot-size averaging facilitates protection of environmentally sensitive areas such as stream corridors, wetlands, steep slopes, and agricultural lands. Ordinance requirements should include:

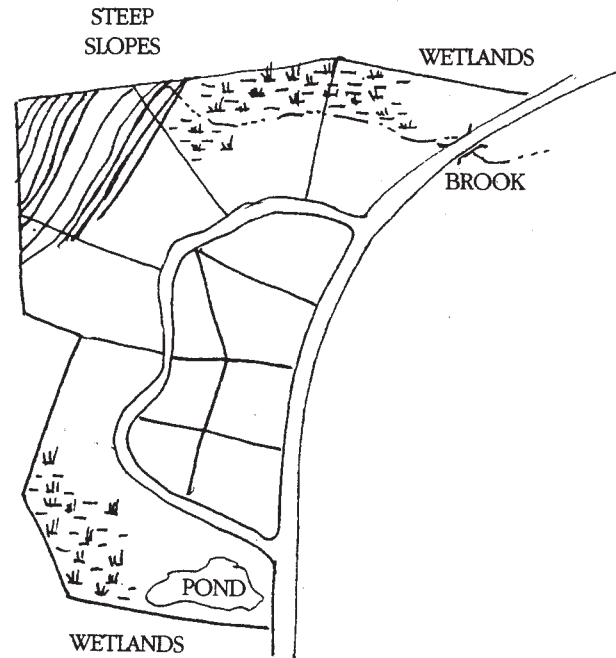
- designating the zones where allowed;
- establishing the minimum parcel size that qualifies;
- establishing a maximum floor area ratio or an impervious cover limit for the principal structure;
- limiting dwelling unit numbers to those allowed under the conventional zoning (numbers are determined by a concept plan for conventional zoning);
- requiring the applicant to demonstrate that the lot size averaging plan is preferable to the conventional plan in achieving the goals and purposes of the ordinance and the Master Plan;
- designating the minimum lot area as well as the required average lot area throughout the subdivision;
- offering an acceptable lot area range;
- requiring deed restrictions to prohibit further subdivision and development of lots larger than

- that allowed under conventional zoning;
- require that new lots can be developed according to town ordinances.

The benefits of lot-size averaging for the municipality and the developer are very similar to those enjoyed by open space/cluster ordinances except that the open space protected remains in private ownership.

LOT SIZE AVERAGING

Table D



Overlay zoning enables municipalities to protect natural, cultural or other resources that exist in more than one zone by establishing protection standards for the specific resource. For example, a **stream corridor protection overlay** zone establishes stream buffer requirements of a set dimension no matter what zone district the stream flows through. Other resources that overlay zoning can protect include **steep slopes, flood hazard areas, aquifer recharge areas and historic districts.**

Critical areas ordinances regulate and provide design standards for environmentally sensitive areas that cross zones. Such ordinances should state these purposes clearly, and define the critical areas, e.g., steep slopes, floodplains, high water table soils, poorly drained soils, shallow depth to bedrock, streams and aquifer recharge areas, and set up specific techniques to protect them: large lot zoning, useable land calculations, buffers, or performance standards.