

Hot Topics in Land Use: Transitioning Communities

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PACE 2014 LAND USE AND SUSTAINABLE DEVELOPMENT CONFERENCE

TRANSITIONING COMMUNITIES

HOT TOPICS IN LAND USE LAW

**Municipal Land Use and Legal Considerations Associated With Advancing Technologies
That Are Central To Communities in Transition**

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INTRODUCTION

What is a hot topic in land use law for 2014-2015?

In preparing for Pace's 2014 Land Use and Sustainable Development Conference, we asked ourselves what is in fact a "hot topic" in municipal land use law as of 2014 related to communities in transition. As we explored that question and surveyed Cuddy & Feder's own land use practitioners, we saw various trends centered around transportation oriented development, utility infrastructure, diversified housing options, access to broadband communications, climate change and alternative energy sources. In narrowing the scope of topics for our presentation we elected to focus on a few land uses where the pace of technological and legal change are significant, the implementation of planning and zoning at times challenging for both municipalities and applicants and the outcomes of significant importance for communities. We have focused on mobile broadband communications infrastructure and alternative energy facilities as two hot topic areas in land use law along with State Environmental Quality Review Act ("SEQRA") and New York State Department of Environmental Conservation's ("DEC") new procedural and substantive requirements and ethics associated with municipal planning processes as related to such projects.

What is a transitioning community?

There appears to be no universally accepted definition of what is a transitioning community. For purposes of our presentation, we have focused on land uses and laws that have the potential to shape a municipalities' environmental sustainability, economic vitality and access to state of the art communications and energy sources.

Alternative Energy Facilities & Mobile Broadband Infrastructure as Hot Topics

Alternative energy sources and related facilities implicate several current policies and issues that cross-sect and ultimately address the delivery of energy to businesses and residents alike. U.S. energy independence policies, climate change inducing impacts from fossil fuels, local reliability and infrastructure security have continued to drive innovation and change in the energy sector. As a result, New York's municipalities have seen new technologies deployed that can include fuel cells, wind farms, solar facilities, compressed natural gas fueling centers, electric vehicle charging stations and other cutting edge applications in the energy sector.

Municipalities can also expect to see greater deployment of wireless communications infrastructure to address the explosion in data use and demand for mobile broadband by consumers. 4G LTE and new applications like the connected car, machine to machine (M2M) and a hockey stick demand curve are driving the need for added wireless infrastructure. As demand grows, the need for in-building systems, small cells, towers and facilities in a competitive marketplace will continue to result in wireless facility deployment.

Prospective Planning by Municipalities Key to Energy and Mobile Broadband Opportunities

To harness these advancements and growth in technology, municipalities should utilize various tools available to them that include planning, review and amendment of local laws, including zoning regulations, as well as development of ongoing policies at the municipal level. Importantly, transitioning communities must also take note of the various State and Federal policies and laws that can be unique to both energy and the mobile communications sectors. This memorandum is intended to provide the reader with resources and legal references as a backdrop to our presentation on December 4, 2014.

Specifically, these written materials are intended to summarize the many policies and laws that can serve as a catalyst for municipalities to take action and plan for the sometimes unique and technical issues presented by energy and wireless land uses. We also address ethics associated with municipal legislative and/or administrative agency actions and some of the latest developments in SEQRA. In the context of transitioning communities, municipalities must be ready to plan for, regulate appropriately and allow for alternative energy and mobile broadband projects that will facilitate economic growth and the well being of local businesses and residents alike.

MOBILE BROADBAND COMMUNICATIONS

Why are communication advancements fostering transition in local communities?

Over the past thirty years, wireless communications have revolutionized the way Americans live, work and play.¹ The ability to reliably connect with one another in a mobile environment has proven essential to the public's health, safety, welfare, as well as a rapidly evolving economy.

As of June 2012, there were an estimated 321.7 million wireless subscribers in the United States.ⁱⁱ Wireless network data traffic was reported at 341.2 billion megabytes, which represents a 111% increase from the prior year.ⁱⁱⁱ Other statistics provide an important sociological understanding of how critical access to wireless services has become. In 2005, 8.4% of households in the United States had cut the cord and were wireless only.^{iv} By December 2012, that number grew exponentially to an astonishing 38.2% of all households and still growing.^v

Wireless access has also provided individuals a newfound form of safety. Today, approximately 70% of *all* 9-1-1 calls made each year come from a wireless device.^{vi}

On May 15, 2014, wireless carriers began offering text-to-911 services nationwide in localities where municipal Public Safety Answering Points (PASPs) support text-to-911 technology. This program allows users to send text messages to emergency services as an alternative to placing a phone call. AT&T and other licensed FCC wireless carriers will support Text-to-911.^{vii} Wireless Emergency Alerts (“WEA”) now also play a role in ensuring public safety through the adoption of the Warning, Alert and Response Network (WARN) Act. “WEA is a public safety system that allows customers who own certain wireless phone models and other enabled mobile devices to receive geographically-targeted, text-like messages alerting them of imminent threats to safety in their area,” minimizing the risk of emergency alerts being delayed in “highly congested areas.”^{viii}

Parents and teens also rely on access to wireless services. In a 2010 study conducted by Pew Internet Research, 78% of teens responded that they felt safer when they had access to their cell phone.^{ix} In the same study, 98% of parents of children who owned cell phones stated that the main reason they have allowed their children access to a wireless device is for the safety and protection that these devices offer.^x

Our health care and education^{xi} systems have also evolved as a result in mobile communication advancements and are relying more and more on robust mobile services. Advancements in mobile communication now enable medical professionals to send and receive patient information and vital-sign data transmissions in furtherance of reducing risks, improving patients’ health status and reducing costs.^{xii} The Food and Drug Administration (“FDA”) has recognized the benefits of wireless technologies in the healthcare industry, including:

Providing the ability of physicians to remotely access and monitor patient data regardless of the location of the patient or physician (hospital, home, office, etc...).

These benefits can greatly impact patient outcomes by allowing physicians access to real-time data on patients without the physician physically being in the hospital and allowing real-time adjustment of patient treatment. Remote monitoring can also help special populations such as our seniors, through home monitoring of chronic diseases so that changes can be detect earlier before more serious consequences occur.^{xiii}

Advancements in communications technology have resulted in an annual multi-billion dollar boost to our economy, and significant cost savings to local businesses and communities.^{xiv}

What does this all mean for New York's municipalities? Well, as a result of the advancements in communications and the public's critical need for these services the Federal Government has adopted many policies and laws in support of the expedited growth of nationwide reliable wireless networks, while trying to respect the regulatory interests of local communities.

What recent Federal wireless policies and decisions impact the legal framework for local laws and procedures related to wireless infrastructure?

In 1996, the United States Congress adopted the Telecommunications Act to "provide for a competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans."^{xv} With respect to wireless communications services, the Act expressly preserved state and/or local land use authority over wireless facilities, placed several requirements and legal limitations on the exercise of such authority, and preempted state or local regulatory oversight in the area of emissions as more fully set forth in 47 U.S.C. § 332(c)(7). In essence, Congress struck a balance between legitimate areas of state and/or local regulatory control over wireless infrastructure and the public's interest in its timely deployment to meet the public need for wireless services. Throughout the past eighteen years, the Federal Government and courts have continually addressed the balance associated with the expeditious provision of wireless service to all Americans and a reservation of state and local permitting authority.^{xvi}

The need for speed – the "Shot Clock"

The Federal regulatory framework of wireless communications establishes timeframes in which municipalities must complete their review of a communications provider's application to deploy wireless infrastructure. These timeframes have been adopted by Congress, upheld by the Courts and clarified by the Federal Communications Commission ("FCC").

The Telecommunications Act requires zoning, land use and other state or local permitting decisions relating to wireless facilities siting requests to be rendered "within a reasonable period of time."^{xvii} In 2009, the FCC issued a Declaratory Ruling defining a "reasonable period of time" as, presumptively, 90 days from the date an application is submitted to a reviewing agency to review and process collocation applications^{xviii} and 150 days to review and process all other applications^{xix} (the "Shot Clock").^{xx} The Shot Clock has the full force and effect of federal law and has been upheld by the United States Supreme Court.^{xxi} Indeed, in City of Arlington v. FCC, the Supreme Court confirmed the FCC's authority to interpret the Telecommunications Act, recognizing that: "[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." Specifically, the Court affirmed the FCC's authority to issue its Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) of the Act, and establish timeframes and policies under the Shot Clock.

In October of this year the FCC adopted formal clarifications of the Shot Clock, confirming exactly how it applies to municipalities and their review of wireless communication applications (the “2014 FCC Order”).^{xxiii} The 2014 Order specifically confirmed the following procedures:

- The timeframe begins to run when an application is first submitted, not when it is deemed complete by the reviewing government;
- Completeness items are those listed in a code or formal procedure of general application, not consultant requests for additional information;
- A determination of incompleteness tolls the shot clock only if the State or local government provides notice to the applicant in writing within 30 days of the application’s submission, specifically delineating all missing information, and specifying the code provision, ordinance, application instruction, or otherwise publically-stated procedures that require the information to be submitted;
- Following an applicant’s submission in response to a determination of incompleteness, the State or local government may reach a subsequent determination of incompleteness based solely on the applicant’s failure to supply the specific information that was requested within the first 30 days; and
- The shot clock begins running again when the applicant makes its supplemental submission; however, the shot clock may again be tolled if the State or local government notifies the applicant within 10 days that the supplemental submission did not provide the specific information identified in the original notice delineating missing information.^{xxiii}

In other words, once a communications application is filed with a municipality the 90 or 150 day period begins to run and will not be tolled unless the municipality responds in writing within the first 30 days and identifies exactly what, if any information is missing per the applicable local code requirements. While an applicant and the reviewing agency may agree to extend the applicable period, expiration of the Shot Clock without a determination by the local agency constitutes a “failure to act” under the Telecommunications Act and allows the applicant to seek redress in federal court as provided for by Section 332(c)(7)(B)(v) of the Telecommunications Act. Importantly, a Shot Clock violation is rebuttable, in that the burden of proof on an unreasonable delay claim based on a municipality’s failure to comply lies with the municipality.

Just this year, the Second Circuit discussed the Shot Clock and the actions of a Westchester County municipality, along with other significant regulatory issues for siting communication facilities in Crown Castle NGE, Inc. v. Town of Greenburgh.^{xxiv} Crown Castle, which installs fiber optic networks known as Distributed Antenna Systems (“DAS”) for wireless carriers, applied to install DAS equipment on utility poles. The Town of Greenburgh has a local Antenna Review Board, which is charged with determining the completeness of an application for antenna installations. Although there was an extended period of debate between the Town and Crown as to whether the application was subject to the Town’s antenna regulations, the Second Circuit noted that the application was filed on November 13, 2009, and ultimately denied more than two and one-half years later in July 2012. The Second Circuit Court affirmed the District Court’s ruling, which reiterated that: “The FCC recognized that applications may be incomplete, and therefore deemed the time it takes for the applicant to respond to request for additional information

excludable from the 90 or 150 day time period, but ‘only if [the municipality] notifies the applicant within the first 30 days that its application is incomplete.’^{xxv}

The Court ruled in favor of Crown, but noted that relief for a Shot Clock violation could not be granted here because the appropriate relief would be an injunction directing the Town to issue a decision in writing (which it had done). Nonetheless, the Court considered the unreasonable time in which it took for the Town to issue a decision in deciding the remedy and directed the Town to issue the requested special permits, finding that remanding the matter to the Town would not be appropriate given the “lengthy delay in processing its applications that [Crown] has already suffered.”^{xxvi} Issuing a denial 252 days after Crown submitted complete applications was well beyond presumptively-reasonable time period set by the Shot Clock. This period did not even include the time spent during the completeness review, “at least some of which should arguably count towards the application processing time given that the Shot Clock only excludes time that it takes the applicant to respond to requests for additional information.”^{xxvii}

“In-fill” Installations – Section 6409 Federal Middle Class Tax Relief and Job Creation Act

Federal policy encourages the use of existing infrastructure to accommodate technological advancements and changes in communications services.

Section 6409 of the Federal Middle Class Tax Relief and Job Creation Act of 2012, was signed into law by the President on February 22, 2012.^{xxviii} While the municipalities retain discretionary zoning review over the construction of new towers, under Section 6409 simple collocations and/or equipment upgrades to existing communications infrastructure must be administratively approved by a municipality without discretionary permits. The Federal law provides that:

a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

Federal law defines an “eligible facilities request” as “(A) collocation of new transmission equipment; (B) removal of transmission equipment; or (C) replacement of transmission equipment.”^{xxix} As with the Shot Clock, the 2014 FCC Order similarly adopted rules to clarify and implement the requirements of Section 6409. Of note, it:

- Confirmed that Section 6409 applies to support structures and to transmission equipment used in connection with any Commission-licensed or authorized wireless transmission;
- Defines “transmission equipment” to encompass antennas and other equipment associated with and necessary to their operation, including power supply cables and backup power equipment;
- Defines “tower” to include any structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities;

- Clarifies that the term “base station” includes structures other than towers that support or house an antenna, transceiver, or other associated equipment that constitutes part of a “base station” at the time the relevant application is filed with State or municipal authorities, even if the structure was not built for the sole or primary purpose of providing such support, but does not include structures that do not at that time support or house base station components;
- Clarifies that a modification “substantially changes” the physical dimensions of a tower or base station, as measured from the dimensions of the tower or base station inclusive of any modifications approved prior to the passage of [Section 6409], if it meets any of the following criteria:
 - for towers outside of public rights-of-way, it increases the height by more than 20 feet or 10%, whichever is greater; for those towers in the rights-of-way and for all base stations, it increases the height of the tower or base station by more than 10% or 10 feet, whichever is greater;
 - for towers outside of public rights-of-way, it protrudes from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater; for those towers in the rights-of-way and for all base stations, it protrudes from the edge of the structure more than six feet;
 - it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets; it entails any excavation or deployment outside the current site of the tower or base station;
 - it would defeat the existing concealment elements of the tower or base station; or
 - it does not comply with conditions associated with the prior approval of the tower or base station unless the non-compliance is due to an increase in height, increase in width, addition of cabinets, or new excavation that does not exceed the corresponding “substantial change” thresholds...^{xxx}

The 2014 FCC Order also outlined the process that municipalities are required to follow for reviewing an application under Section 6409, as follows:

- A State or local government may only require applicants to provide documentation that is reasonably related to determining whether the eligible facilities request meets the requirements of Section 6409(a);
- Within 60 days from the date of filing, accounting for tolling, a State or local government shall approve an application covered by Section 6409(a); and
- The running of the period may be tolled by mutual agreement or upon notice that an application is incomplete provided in accordance with the same deadlines and requirements applicable under Section 332(c)(7), as described below, but not by a moratorium;^{xxxii}

Significantly, if a local government fails to act within the above timeframes (contrasted with those time periods under the Shot Clock), then the application filed under Section 6409(a) is deemed granted.^{xxxii} Unlike under the Shot Clock – “whereas a municipality may rebut a claim of failure

to act under Section 332(c)(7) if it can demonstrate that a longer review period was reasonable, that is not the case under Section 6409(a).”^{xxxiii}

ALTERNATIVE ENERGY

State policy and law related to advancements in alternative energy infrastructure

The New York Energy Law (section 3-101) sets forth the New York State energy goals, including:

to foster, encourage and promote the prudent development and wise use of all indigenous state energy resources including, but not limited to, on-shore oil and natural gas, off-shore oil and natural gas, natural gas from Devonian shale formations, small head hydro, wood, solar, wind, solid waste, energy from biomass, fuel cells and cogeneration

As an outgrowth of the State Energy Policy, identified in part above, New York State has advanced several energy policies that will allow the State, municipalities, and local residents to continue to advance energy alternatives.

For example, proposed legislation in the New York State Assembly (Bill A. 00498) would amend N.Y. Town Law § 263 and N.Y. Village Law 7-704 to require local building and planning regulations to accommodate the use of alternative energy technologies, including “solar thermal, photovoltaic, wind, hydroelectric, geothermal electric, geothermal ground source heat, tidal energy, wave energy, ocean thermal, and fuel cells using renewable fuels.”

As discussed below, the State of New York has set forth several initiatives and policies, including the Power New York Act of 2011, Net Metering Laws and the Sun Initiative that seek to implement the State’s energy goals.

Power NY Act 2011

In 2011 the State of New York enacted the Power New York Act (often referred to as “Article 10”).^{xxxiv} The Power New York Act of 2011 was enacted after the expiration of Article X of the Public Service Law, which required all energy facilities generating over 80 MW of power to seek approval from the State Siting Board thus preempting local zoning authority. The Power New York Act of 2011 now requires energy facilities producing more than 25 MW of power to seek approval from the Board, which promotes alternative energy facilities by allowing for a more streamlined process for siting.^{xxxv}

The Power New York Act of 2011 permits the State Siting Board to review and permit energy facilities rather than municipal and local land use agencies. The Power New York Act of 2011 specifically states:

Notwithstanding any other provision of law, no state agency, municipality or any agency thereof may, except as expressly authorized under this article by the board, require any approval, consent, permit, certificate or other condition for the construction or operation of a major electric generating facility with respect to which an application for a certificate hereunder has been filed[.]^{xxxvi}

When granting a certificate, the Board must find that the facility is designed to operate in compliance with “applicable state and local laws and regulations.”^{xxxvii} However, the Board cannot apply, in whole or in part, any local laws, regulations, or standards that are “unreasonable burdensome” in view of the existing technology or needs of the facility, including the connection to and use of water, electric, sewer, telecommunication, fuel and steam lines in public rights of way.^{xxxviii}

The Power New York Act 2011 is designed to facilitate a comprehensive State siting procedure and serves to promote the efficient siting of energy facilities that produce more than 25 MW of energy, including wind, solar, and fuel cell developments.

Net Metering

Net metering laws in New York have expanded greatly since they were first enacted in 1997 and applicable to only solar systems up to 10kw.^{xxxix} The net metering laws, New York Public Service Law § 66-j, now includes most sources of alternative energy, whether that be small scale residential or larger scale commercial or farm based energy production, including solar, wind, farm based, or fuel cell.^{xl} Property owners are able to sell unused energy back to the electric grid, assuming production is less than 25 MW and therefore not under the jurisdiction of the State Siting Board.^{xli}

The trend in expanding New York’s net metering laws is an example of New York acting in furtherance of its energy goals. Net metering encourages residential and commercial property owners to supplement their on-site energy needs through alternative sources (e.g. solar, wind, fuel cell).

Solar Energy Fast Track Local Permitting

The New York Sun Initiative seeks to expand solar energy in the State of New York. The Sun Initiative was launched by Governor Cuomo in 2012 and in 2014 Governor Cuomo expanded the initiative through “a \$1 billion investment in the NY-Sun initiative that would spur development of a market-driven, sustainable, subsidy-free solar industry and launched the statewide NY-Sun Incentive Program to help reach these goals.”^{xlii}

A discussion concerning the expansion of solar energy must include the various local and municipal approvals that may be required. The New York Sun Initiative has set forth the New York State Unified Solar Permit that is designed to allow municipalities to enact a standardized

residential/small business solar permitting system and removes the barriers currently hindering solar growth.^{xliii}

In addition to the New York State Unified Solar Permit, the Sun Initiative highlights the efforts taken by the Long Island Power Authority, the Suffolk County Planning Commission and the Nassau County Planning Commission to launch the Long Island Unified Solar Permitting Initiative “LISUPI”.^{xliiv} The LISUPI has adopted the Fast Track Permit Application process whereby local governments are encouraged to:

- Require waived or minimal application fees;
- Provide permit determinations within 14 days of submittal of a completed application; and
- Utilize the *"Solar Energy System Fast Track Permit Application"* as an alternative to existing building permit forms.

The Fast Track Application is designed to require targeted information concerning the solar proposal and not require costly submission materials that are not applicable for small scale projects (e.g. a new property survey).

The Town of Brookhaven has enacted a “Fast Track Permitting Process” located in Section 85-13(B) of the Town Code. Notably, and in accordance with the fast track permitting process, the Town of Brookhaven Chief Building Inspector shall:

- Notify the Historic District Advisory Committee if the subject property is located within an historic district, which shall meet and make a determination on said application within 14 days of receipt of same; and
- Make a determination within 14 days of receipt of a complete application.^{xliv}

Solar Energy and Homeowners Associations

Homeowners associations have often privately contracted to restrict and in some instances prohibit solar energy installations. Identifying a contradiction with State policy, Assemblywoman Galef proposed to amend the Real Property Law to prohibit homeowners associations from banning the installation of solar arrays and the installation of rooftop solar panels. New York Bill A.8296 states:

No Board of Managers shall ban in the by-laws, any solar panel arrays, the installation of rooftop solar panels or the clearing and trimming of vegetation on unit owners’ properties that obscure such solar panel arrays or rooftop solar panels; provided, however, that the Board of Managers shall be consulted regarding the aesthetics of such solar panel arrays and rooftop solar panels.

Wind Energy

Wind energy in New York is a large source of alternative energy. The question becomes, how are municipalities permitting wind facilities, including residential facilities, that are not governed under the Power New York Act of 2011.

In W. Beekmantown Neighborhood Ass'n, Inc. v. Zoning Bd. of Appeals of Town of Beekmantown, the Town's Zoning Board of Appeals granted respondents Windhorse Power, LLC a conditional use permit to construct a wind farm as a "public utility" providing essential service, as defined under the Town Zoning Law.^{xlvi} The determination was challenged and the Court held that while "public utility" is not defined by the zoning code "it is undisputed that the wind turbines that Windhorse intends to construct will generate energy, a useful public service, and will be subjected to regulation and supervision by the Public Service Commission."^{xlvii} The Court, while upholding the Zoning Board of Appeal's determination, noted that the Zoning Board of Appeals is entitled to great deference and the neighborhood association did not demonstrate that the Zoning Board of Appeals was without a rational basis to conclude that the proposed wind farm was a public utility.

This holding that wind facilities are public utilities for the purposes of local zoning was also upheld by Wind Power Ethics Grp. (WPEG) v. Zoning Bd. of Appeals of Town of Cape Vincent.^{xlviii} The Court in Wind Power Ethics Grp. (WPEG) v. Zoning Bd. of Appeals of Town of Cape Vincent, held that "the classification by the ZBA of the series of wind-powered generators as a utility within the meaning of section 315 of its Zoning Law is neither irrational nor unreasonable, and that the determination is supported by substantial evidence."^{xlix}

Fuel Cell

More and more residential and commercial property owners are contemplating the use of fuel cells to serve on-site energy needs that often use natural gas as a source of energy. A fuel cell may be installed on a commercial site and is capable of producing continuous reliable electric power for the commercial building(s) which will in turn reduce the building(s) energy demand from the electric grid with the by-product typically heat as opposed to CO₂ and therefore have an overall beneficial environmental effect. Fuel cell technology has caught the eyes of the New York State Legislature, Senate Bill S7460 (which has passed in the Senate) establishes a fuel cell incentive program that will be managed by NYSERDA to encourage development of fuel cell generating systems. Furthermore, New York State Assembly Bill 06644A (which has not been voted on) seeks to exempt fuel cell electric generating systems from sales and compensating use taxes. Moreover, Assembly Bill 06644A specifically allows municipalities to grant exemptions from local sales and use taxes.

Recently, Morgan Stanley obtained local approvals and installed a fuel cell for their offices in Purchase, New York.¹ The fuel cell will produce up to 250 kW of reliable electric power. The Morgan Stanley example demonstrates that local governments will start to see an influx of fuel

cell projects as the technology progresses and the technology continues to be incentivized by State policy. While the Power New York Act of 2011 preempts local zoning with regard to large-scale energy facilities, local governments are seeing alternative energy applications and should plan for same including consideration of streamlined administrative site plan permitting.

Natural Gas

Natural gas is an alternative fuel source that local governments must consider. Indeed, the collection of natural gas through the process of hydraulic fracturing has been a hot topic for debate. The issue concerning local governments' ability to regulate hydraulic fracturing has been thoroughly vetted by the Courts and is still important to note for any municipality seeking to understand the ongoing transition and availability of various energy sources.

In Wallach v. Town of Dryden, the New York Court of Appeals addressed the issue of whether municipalities may ban oil and gas production activities, including hydrofracking, through adoption of local zoning laws.ⁱⁱ Norse Energy Corp. USA ("Norse"), plaintiff in one of the companion cases, had acquired oil and gas leases from landowners in the Town of Dryden ("Dryden") prior to Dryden's amendment to its zoning ordinance expressly prohibiting hydrofracking within municipal boundaries. Similarly, Cooperstown Holstein Corporation ("CHC") executed two leases with a landowner in the Town of Middlefield ("Middlefield" and, together with Dryden, the "Towns") to explore hydrofracking in the area before Middlefield amended its master plan to prohibit it. In challenging these prohibitions, both Norse and CHC argued that the Towns did not have the authority to prohibit hydrofracking because such prohibition had been preempted by the supersession clause in the Oil, Gas and Solution Mining Law (the "OGSM Law") as set forth in section 23-0303(2) of the Environmental Conservation Law. The Supreme Courts sided with the Towns in both instances, and were subsequently affirmed by their respective Appellate Divisions.

In determining whether the Towns' zoning amendments prohibiting hydrofracking were preempted, the Court looked to (1) the plain language of the supersession clause of the OGSM Law, (2) the statutory scheme as a whole, and (3) the relevant legislative history.

Addressing the first factor, the Court found "that ECL 23-0303(2) is most naturally read as preempting only local laws that purport to regulate the actual operations of oil and gas activities, not zoning ordinances that restrict or prohibit certain land uses within town boundaries."ⁱⁱⁱ Thus, the Court concluded, the plain language did not support preemption of the Towns' zoning amendments. With respect to the second factor, the Court found the OGSM Law is primarily concerned with the Department of Environmental Conservation's regulation of the safety, technical, and operational aspects of oil and gas activities in New York, and that the limited reading of the supersession clause in ECL 23-0303(2) fit comfortably within that framework. Finally, in concluding that the legislative history supported its reading, the Court found that the change in language in the OGSM Law – from "to *foster, encourage and promote* the development, production and utilization of natural resources of oil and gas" to "to *regulate* the development,

production and utilization of natural resources of oil and gas” – buttressed the holding that the supersession clause did not interfere with the Towns’ zoning laws.

Ultimately, the Court held that the Towns’ zoning laws were valid “in light of ECL 23–0303(2)’s plain language, its place within the OGSM [Law’s] framework and the legislative background,” and because the Court could not say “that the supersession clause—added long before the current debate over high-volume hydrofracking and horizontal drilling ignited—evinces a clear expression of preemptive intent.”^{liii}

Indeed, ancillary issues unrelated to hydraulic fracturing must also be considered. For instance in Nat’l Fuel Gas Supply Corp. v. Town of Wales, National Fuel Gas Supply Corporation sought to construct a national gas compressor station in the Town of Whales, New York.^{liv} Accordingly, National Fuel obtained a Certificate of Public Convenience from the Federal Energy and Regulatory Commission, which is a mandatory approval required under federal law. In the meantime, National Fuel submitted a Special Use application to the Town of Whales “as a matter of cooperation.” Prior to the Special Use permit being approved, FERC issued the appropriate Certificate of Public Convenience under federal law.

The FERC Certificate read in part that:

National Fuel shall make all reasonable efforts to ensure its predicted noise levels from the east Aurora Compressor Station are not exceeded at nearby NSAs and file a noise survey showing this with the Secretary no alter than 60 days after placing the East Aurora Compressor Station in service.

Moreover, the FERC Certificate stated:

Any State of local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.

Indeed, the Town approved the associated Special Use Permit, however it was the position of National Fuel that the Special Use Permit was inconsistent with the above quoted language from the FERC Certificate, because the Special Use Permit separately requires that “predicted noise levels from the compressor station shall not be exceeded at nearby NSAs”. The Court held that this Special Permit Condition is clearly more stringent then the FERC Certificate condition that National Fuel shall “make all reasonable efforts” to ensure that noise level do not exceed nearby NSAs.

In holding that the FERC Certificate preempted local regulations the court stated that “matters sought to be regulated by [the Town] were [] directly considered by FERC, ... such direct consideration is more than enough to preempt.” Here, the noise level were specifically regulated by the FERC Certificate and therefore preempted from local control.

SEQRA AND AMENDING LOCAL REGULATIONS

Key procedural issues arising under SEQRA and implicated in planning for and amending zoning regulations regarding mobile and energy infrastructure

As discussed above, transitioning communities will need to consider planning and zoning changes to accommodate new forms of mobile and energy infrastructure. It is well settled that the ultimate test is “whether the change is other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community.”^{lv}

In Clear Skies Over Orangeville v. Town Bd. of Town of Orangeville, a citizen group challenged 2009 enactment by the Town revising the pre-existing zoning code, which included new provisions intended to govern prospective large-scale wind energy development.^{lvi} The new provisions would be more strict and would require every “wind energy conversion device” (wind turbine) to be set back 500 feet from the nearest turbine, 500 feet from the nearest property line, 700 feet from the property line of a “non-participating resident”, 1320 feet from the nearest dwelling or public building, and 1.2 times its height to the nearest road. In addition the new wind ordinance provided design, construction, access, safety, clearance, lighting, signage, and landscaping guidelines. Other standards include noise, shadow, flicker, electromagnetic interference and avian regulations.

Prior to the wind energy regulations the following took place:

- 1) Moratoria was set into place during the period where the 1964 zoning law remained in effect;
- 2) December 13, 2007 enactment of the Town's Comprehensive Plan;
- 3) The New York State Attorney General's promulgation of a “General Code of Conduct For Wind Farm Development” on October 30, 2008;
- 4) Intervenor's December 3, 2008 public disclosure of its business dealings with members of the Town Board and those members' families;
- 5) The Town Planning Board's initial draft of the zoning amendments;
- 6) Hiring of an environmental review specialist in February 2009;
- 7) February 19, 2009 designation of itself as lead agency under SEQRA;
- 8) Official promulgation of Parts 2 and 3 of the full EAF and their issuance of a negative declaration on September 23, 2009, the same date on which the zoning amendments were enacted.

After the enactment of the wind energy provisions, the citizen group commenced an Article 78 proceeding and set forth the following causes of action, *inter alia*: 1) the Town failed to identify

and take a hard look at certain environmental impacts under SEQRA, 2) the Town impermissibly segmented their environmental review of the zoning amendments from any future wind development, 3) the zoning amendments were inconsistent with Town's Comprehensive Plan, 4) a majority of the members of the Town Board allegedly had a direct or indirect financial interest in the development, and 6) the alleged direct or indirect financial interests required the affected Town Board members to recuse themselves.

The Court found that the Record to be clear that the Town did not ignore the potential noise created from the new wind provisions. Among other studies in the Record, Part 3 of the Environmental Assessment Form ("EAF") clearly sets forth that the wind energy regulations create specific setbacks and buffers to mitigate the noise impacts and maximum noise standards. As to the allegation that the Town Board improperly segmented the rezoning process from the actual development, the Court held that the Town Board acted appropriately under SEQRA. Indeed, "a developer is not permitted to exclude certain activities from the definition of a project for the purpose of making it appear that adverse environmental impacts have been minimized for the purpose of circumventing the detailed review called for under SEQRA."^{lvii} Further, the lead agency "must not consider the cumulative effect of other simultaneous or subsequent actions that are included in any long-range plan of which the action under consideration is a part."^{lviii}

In this instance the wind energy regulations proscribed rigorous standards by way of special use permits and site plan review and required compliance with all SEQRA regulations. In addition, the provisions limit the placement of turbines by the various setback requirements in the code (as stated above).^{lix} Moreover, the local code governs "operational characteristics" and also provides for sureties such as decommissioning bonds. Thus, the Court held that the provisions are "intended to require a level of review that would preclude such projects and instead permit only those projects for which it can be adequately demonstrated that adverse impacts will be avoided."^{lx} Additionally, because no wind energy development applications were before the Board such an analysis would be to speculative and therefore impermissible segmentation did not take place.^{lxi}

The Court also found the wind provisions to be completely consistent with the Town's Comprehensive Plan.^{lxii} The Court noted that a comprehensive plan may not be located in a single document but in all documents that reflect the Town's land use policies. Important and relevant to transitioning communities the court stated:

[A] municipality of course may amend its zoning ordinance to promote the general welfare of the community and to respond to changing community conditions because 'sound planning' inherently calls for recognition of the dynamic of change.^{lxiii}

In this instance, the Comprehensive Plan specifically stated that it is a local goal to "allow development of alternative energy sources to take place within the Town but direct it to those areas that are most suitable."^{lxiv} Thus, the enacted provisions are consistent with the Comprehensive Plan, both the document and the land use goals of the Town.

Lastly, as for the allegations related to municipal ethics and the financial interests of the Board members, the Court held that none of the interests held by the Town Board members required their recusal.^{lxv} First, because this rezone was not tied to one specific developer, New York GML Section 809(2) was not applicable.^{lxvi} Moreover, the lease interests held by the Board members were either in other municipalities or were potential deals that involved the family members of the Board members and thus inapplicable.^{lxvii}

SEQRA Review and Rezoning – Studying the Impacts

In Highview Estates of Orange Cnty., Inc. v. Town Bd. of Town of Montgomery, Orange Cnty., Taylor Holdings Group, Inc. petitioned the Town Board of the Town of Montgomery seeking amendments to the Town Zoning Code that would permit it to expand its facilities to include a biomass gasification-to-energy facility.^{lxviii} The new facility would produce renewable energy from construction debris, commercial waste and municipal solid waste, however to be constructed the subject property must be rezoned. The proposal sought to re-zone 13.3 acres of Taylor's property into the Industrial District ("ID") and designate the entire site within the newly created "Biomass Gasification-to-energy District," which was a floating zone.^{lxix}

The Town Board was asked to approve the re-zone, comply with the State Environmental Quality Review Act, approve the project site plan, and issue a special permit for the operation of the facility. Accordingly, the Town Board adopted the Final Environmental Impact Statement ("FEIS") and issued all approvals. The approvals were challenged alleging that, *inter alia*, the Town Board failed to comply with SEQRA and the determinations were arbitrary and capricious.

In reversing the lower court, the Second Department held that the Town Board's SEQRA review was sufficient and included a review of the new floating BGTE District. Importantly, the Court stated that:

Given the floating nature of the BGTE District, and the fact that standards and procedures for the creation of new BGTE Districts were adopted, including the necessity for adoption of another local law to create any further BGTE Districts, the Town Board was not required to evaluate, on a conceptual basis, potential impacts from any other facility that might later be constructed in a hypothetical BGTE District that might later be established.^{lxx}

In Bergami v. Town Bd. of Town of Rotterdam, the Town of Rotterdam, in December 2001, adopted a comprehensive plan that included, *inter alia*, a change in the zoning designation for the subject property from agricultural to industrial.^{lxxi} However, the Town Board never took action to rezone the subject property and thus it remained agricultural. Subsequently, the Town continued to study its land use policies with the 2004 Thruway Exit 25A Study, which indicated that the subject property should be rezoned to professional office. In 2009 the Town Board adopted the Thruway Exit 25A Study into its Comprehensive Plan. However, the Town Board still took no action on the rezone despite the Comprehensive Plan amendment.

In 2009 the owners of the subject property, which is a 2.34-acre parcel, petitioned the Town Board to rezone the area “general business.”^{lxxii} Accordingly, the Town Board issued a SEQRA Negative Declaration and approved the rezoning request. Bergami commenced the Article 78 action seeking to annul the decision alleging, *inter alia*, that the rezone conflicts with the Town’s Comprehensive Plan. After reviewing the bedrock principles of spot zoning the court held that Bergami did not meet their burden in proving that the zoning change was contrary to the Town’s Comprehensive Plan.^{lxxiii}

Notwithstanding compliance with the Comprehensive Plan the Court annulled the rezone because the Town Board failed to comply with SEQRA because it did not “identify the relevant areas of environmental concern, take a hard look at them and make a reasoned elaboration of the basis for its determination.”^{lxxiv} The Court stated that the Town board was required to examine simultaneous actions which were “(1) included in any long-range plan of which the action under consideration is a part; (2) likely to be undertaken as a result thereof; or (3) dependent thereon.”^{lxxv}

In this instance, the Town Board relied on a letter provided by the applicants engineer just two days before the vote and the Thruway Exit 25A Study, which did not address all environmental issues related to the rezone. In addition, the Town identified relevant areas of environmental concern rather than making an assessment of the potential impacts of the rezone as it was required to under SEQRA.^{lxxvi}

SEQRA Review and Rezoning – Segmentation

Segmentation is “the division of the environmental review of an action such that various activities or stages are addressed [for purposes of environmental quality review] as though they were independent, unrelated activities, needing individual determinations of significance.”^{lxxvii} Segmentation is impermissible when “the environmental review of an action is divided into smaller stages in order to avoid the detailed review called for under SEQRA. *Id.* Segmentation is permitted “when the agency conducting environmental review clearly sets forth the reasons supporting segmentation and ‘demonstrate[s] that such review is clearly no less protective of the environment.’” *Id.*

In the context of rezoning, segmentation can become an issue where a specific developer has proposed an action, such as a wind energy development, and the rezone is geared towards permitting such development. The question becomes should the SEQRA review include the rezone and the proposed project or should they be permissibly segmented into two review stages. In Finger Lakes Pres. Ass'n v. Town Bd., Town of Italy Ecogen Wind, LLC, residents of the Town of Italy, New York, commenced an Article 78 action against the Town Board of the Town of Italy for its rezoning of two areas in southern portion of the Town as Wind Energy Incentive Zones (“WEIZ”).^{lxxviii} The Preservation Association made several claims including, *inter alia*, improper deferred and segmented SEQRA review, failure to mitigate identified impacts under SEQRA, improper segmentation under SEQRA, and violations of the open meetings law concerning a Town Board field trip to a wind energy site.

The Court held that the wind energy “field trip” was not a violation of the Open Meetings Law. Only three members attended the trip and affidavits were submitted to evidence that one Board member drove alone and that the three Board members did not discuss the proposed law while studying the noise levels at the field trip site.^{lxxxix}

With respect to SEQRA the Court held that the Town did not engage in improper segmentation because consideration of a wind developers special use application under the newly enacted law was a “separate action” from enacting the “WEIZ”.^{lxxx} Importantly, the Court stated that “the Town was therefore not required to consider the specifics of potential permit applications before its SEQRA review for enactment of the local zoning law.”^{lxxxii}

Lastly, the Court held that the Town did not impermissibly substitute “incentives” under the WEIZ law for mitigation of the potential adverse impacts (e.g. noise).^{lxxxiii} The Court stated that “[t]he use of incentive zoning in the formulation of land use policies for wind farms is novel, and this court could find no published cases regarding it.”^{lxxxiii} The Town took the position that because some impacts (e.g. noise) cannot be fully mitigated the Town should seek benefits through the incentive process.^{lxxxiv} Conversely, the Preservation Association took the position that SEQRA does not allow the substitution of incentives for the mitigation of potential adverse impacts. The Court ultimately held that the Town did not fail to mitigate potential impacts and stated that SEQRA does not require that all conceivable impacts and mitigating measures be identified and addressed to satisfy the substantive requirements of SEQRA.^{lxxxv} Further, the court held that mere dissatisfaction of a proposed mitigation measure is not reviewable by the Court so long as the measures have a rational basis.^{lxxxvi} Indeed, there is no requirement that every conceivable mitigation measure be imposed.^{lxxxvii}

SEQRA Review and Rezoning – Litigation / Timing

In instances where a change in zoning by a municipality is directly connected to a proposed project or is the result of a developers petition, and the coordinated SEQRA process reviews both the legislative action and the proposed development it is important to understand when the four month statute of limitations begins to run on any SEQRA determination. *See* CPLR § 217 (1).

In Stop-The-Barge ex rel. Gilrain v. Cahill, the applicant was issued a Conditional Negative Declaration and then received its air permit from the DEC approximately one year after the Conditional Negative Declaration. In a challenge to the Conditional Negative Declaration after the air permit was granted the Court held that “the period of limitations must be measured at the latest from the time that the CND became final, on February 18, 2000. Additionally, the issuance of the CND resulted in actual concrete injury to petitioners because the declaration essentially gave the developer the ability to proceed with the project without the need to prepare an environmental impact statement.”^{lxxxviii} Importantly, in Stop-The-Barge ex rel. Gilrain v. Cahill, after the Conditional Negative Declaration was issued the lead agency conducted no more SEQRA review and made no further SEQRA declarations on the project.

Conversely, in Eadie v. Town Bd. of Town of N. Greenbush, an Article 78 action was commenced challenging a rezone within four months of the rezoning but more than four months after the SEQRA determination.^{lxxxix} The Court of appeals held that that statute of limitations related to a SEQRA determination began to run from the Town Board granting a zoning amendment and not from the SEQRA determination in the first instance.^{xc}

The Court stated that “[a]n article 78 proceeding brought to review a determination by a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.”^{xc1} Moreover, the Court stated that this time period begins to run when the petitioner has “suffered a concrete injury not amenable to further administrative review and corrective action.”^{xcii} In this instance, the Court found that “no concrete injury was inflicted until the rezoning was enacted, and that therefore petitioners’ SEQRA claims were timely brought.”^{xciii} Notwithstanding, the Court in N. Country Citizens for Responsible Growth, Inc. v. Town of Potsdam Planning Bd. stated “[t]hose cases in which the SEQRA determination was made by one agency, and review of the action of a second agency or legislative body is thereafter sought, are distinguishable. 39 A.D.3d 1098, 1103, 834 N.Y.S.2d 568, 573 (3rd Dep’t 2007)

In Patel v. Bd. of Trustees of Inc. Vill. of Muttontown (2014 case), the Court stated:

An action taken by an agency pursuant to SEQRA may be challenged only when such action is final. An agency action is final when the decisionmaker arrives at a ‘definitive position on the issue that inflicts an actual, concrete injury.’ The position taken by an agency is not definitive and the injury is not actual or concrete if the injury purportedly inflicted by the agency could be prevented, significantly ameliorated, or rendered moot by further administrative action or by steps available to the complaining party.^{xciv}

The Court held that the SEQRA findings statement did not “inflict injury in the absence of an actual determination of the subject applications for a special use permit and site-plan approval” and therefore the challenge to the adoption of the findings statement is not yet ripe for review.^{xcv}

Likewise in Gedney Association v. City of White Plains, the Court held that “[w]here, as here, a SEQRA review is conducted upon the filling of applications for a special permit and site plan approvals, the issuance of a findings statement at the conclusion of process inflicts no concrete injury, and a challenge thereto is not ripe for adjudication, unless and until there is an actual determination of the subject applications.”^{xcvi}

SEQRA Review and Rezoning – The New Environmental Assessment Forms

The New York State Department of Environmental Conservation (“DEC”) has proposed new SEQRA Forms since 2007, and were placed into effect on October 7, 2013. The Short EAF (“SEAF”) and the Full EAF (“FEAF”) are much longer than they were before. The new forms are

available online at <http://www.dec.ny.gov/permits/6191.html> and should be used for all projects going forward.

One major change that must be noted is that the DEC is recommending the SEAF for most projects. The new SEAF Workbook clearly states that use of the Full EAF should be limited to actions which are “almost” Type I’s:

There may be instances when an action falls just below the criteria of a Type I action, and the FEAF might be more appropriate than the SEAF. Once a determination has been made for the Type of Action, you can move on the appropriate introductory page for the Full EAF or Short EAF. [Workbook page 3]

Notwithstanding, the SEQRA Regulations give lead agencies discretion to require the FEAF, even for unlisted actions.

For Unlisted actions, the short EAF must be used to determine the significance of such actions. However, an agency may instead use the full EAF for Unlisted actions if the short EAF would not provide the lead agency with sufficient information on which to base its determination of significance. The lead agency may require other information necessary to determine significance.⁶ NYCRR 617.6 [a][3]

Additionally, the SEQRA Regulations [617.2 (m)] define “EAF” somewhat tautologically as a document with sufficient information, so there can always be a fact-based argument about whether the short EAF contained “enough information” in the particular case. A properly completed EAF must contain enough information to describe the proposed action, its location, its purpose and its potential impacts on the environment.

Among other actions, SEQRA regulation 617.4(b) identifies the following as Type I actions:

- 1) The adoption of a municipality's land use plan, the adoption by any agency of a comprehensive resource management plan or the initial adoption of a municipality's comprehensive zoning regulations;
- 2) The adoption of changes in the allowable uses within any zoning district, affecting 25 or more acres of the district; and
- 3) The granting of a zoning change, at the request of an applicant, for an action that meets or exceeds one or more of the thresholds given elsewhere in this list;

In addition it is well settled that, a legislative enactment is exempt under SEQRA if it is an enactment in connection with any other action that is exempt under SEQRA as a Type II

action.^{xcvii} However, under 617.4(b)(3) where the zoning change is at the request of an applicant for an action that is on the Type I list, the rezone itself will be a Type I action.

ETHICS IN LAND USE LAW

“Lobbying” under the State Lobbying Act

If a local law or ordinance is introduced to change the zoning in a municipality, activities by proponents of or against the law to influence the passage or defeat of that legislation might be considered lobbying, if not specifically exempted under the New York State Lobbying Act.^{xcviii} Notably, “municipality” is limited under the State Lobbying Act to only include certain jurisdictional subdivisions of the state, such as counties, cities, towns and villages, with a population of more than fifty thousand. The definition of “lobbying” under the State Lobbying Act was amended in 2005 to expand its meaning. The term “lobbying” or “lobbying activities” currently means and includes any attempt to influence:

(vii) the passage or defeat of any local law, ordinance, resolution, or regulation by any municipality or subdivision thereof;...[or]

(ix) the adoption or rejection of any rule, regulation, or resolution having the force and effect of a local law, ordinance, resolution, or regulation; ...”

Lobbying includes a number of other activities as well. However, the State Lobbying Act also expressly excludes certain individuals from the meaning of lobbyist and the State Lobbying Act’s associated requirements:

(C) Persons who participate as witnesses, attorneys or other representatives in public proceedings of a state or municipal agency with respect to all participation by such persons which is part of the public record thereof and all preparation by such persons for such participation;

(D) Persons who attempt to influence a state or municipal agency in an adjudicatory proceeding, as “adjudicatory proceeding” is defined by section one hundred two of the state administrative procedure act;....”

Indeed, the New York State (Temporary) Lobbying Commission (currently known as the Joint Commission on Public Ethics) confirmed that the representation of clients seeking to change zoning laws prior to the introduction of a proposed law to a legislative body, including the preparation of applications, public meetings, private meetings and correspondence with public officials is not lobbying.^{xcix} The Commission noted that the “actions of the attorneys were all preliminary to the creation of any local legislation required to carry out their client’s objectives,”

and so – fell within the specific exemptions of the State Lobbying Act.^c Likewise, although there is little case law dealing with the Act’s current lobbying definition, in 2012 the Supreme Court of New York County held that a “law firm did not engage in illegal lobbying in the absence of evidence that the firm met with public state or local officials to pass, defeat or modify legislation or affect rule-making, rate-making, or procurement activity.”^{ci}

State Lobbying Act Requirements

The State Lobbying Act does not prohibit lobbying activities, but requires lobbyists to register and disclose lobbying information. “The governmental interest involved in lobby disclosure is not really concerned with whether or not lobbying is evil. The governmental interest here is in providing the public and government officials with knowledge regarding the source and amount of pressure on government officials.”^{cii} Lobbyists receiving more than five thousand dollars of reportable compensation for a particular matter must biennially file a statement of registration with the Joint Commission on Public Ethics for each biennial period.^{ciii} The State Lobbying Act requires lobbyists to keep these statements for a period of at least three years.^{civ} The State Lobbying Act sets forth penalties that include criminal convictions and civil fines.^{cv} For example, a lobbyist “who knowingly and willfully fails to [timely] file a statement or report” or violates the statutory gift prohibition is subject to a fine of up to \$25,000, and guilty of a class A misdemeanor, or class E felony for repeated violations. Intentionally filing a false statement or report carries a civil penalty of up to \$50,000, and the Joint Commission can prohibit individuals from performing lobbying activities for a period ranging from one to four years.

Attorney Ethics

For attorneys, Disciplinary Rule 7-104(A)(1) of the Lawyer’s Code of Professional Responsibility states that:

During the course of the representation of a client a lawyer shall not:
Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.^{cvi}

In a 2007 opinion issued by the State Bar Association, in which it applied Rule 7-104(A)(1) to a planning board proceeding. The Bar Association determined that the Rule:

Absent the application of state or local ordinances that prohibit or regulate the practice, and subject to the qualifications set forth in this opinion, permits a lawyer representing a private party before a town planning board to communicate with individual planning board members about pending SEQRA, site plan and subdivision determinations provided: (a) the proposed communications solely

concern municipal development policy issues; and (b) the lawyer gives planning board counsel reasonable advance notice of the proposed communications. (Emphasis added).^{cvi}

The Bar Association’s opinion was rooted in the “concern for protecting the First Amendment interests of citizens to contact governmental decision makers.”^{cvi} Citing the New York Court of Appeals, regarding “party” status of employees of corporations and other entities for Rule 7-104(A) purposes, the opinion notes that DR 7-104(A)(1) prohibits “only communications with government officials who have authority, individually or as part of a larger body, to bind the government or to settle a litigable matter, or whose act or omission gave rise to the matter in controversy” such as the Planning Board in the 2007 opinion (and presumably limited to those individuals that constitute “parties” under the Disciplinary Rule).^{cix} Lastly, the 2007 opinion refrained from opining on “ex parte communications with an adjudicatory government body, such as a zoning board of appeals, which present different considerations.”

In Stein v. the Town of Islip ZBA, the Second Department found that due process rights of an owner were violated, where he was seeking ZBA approval to establish legal nonconforming status and alter the existing building, as a result of the Board’s ex parte receipt and consideration of letter from a neighbor following the public hearing.^{cx} The Court remitted the case to the Board to hold a new hearing at which the owner would have the opportunity to refute the claims in the letter.

“Gifts”

While State General Municipal Law (“GML”) generally allows municipal officials to accept or receive gifts having a value of less than seventy-five dollars,^{cx} the State Lobbying Act prohibits lobbyists from giving them. Lobbyists under the State Lobbying Act are restricted from offering or giving a gift to any public official or to a member of their family. The Lobbying Act defines a “gift” as “anything of more than nominal value given to a public official in any form...”, but excluding minor items such as complimentary food and beverage, ceremonial plaques and food or beverage valued at fifteen dollars or less.^{cxii}

In Tuxedo Land Trust, Inc. v. Town of Tuxedo, in 2004, the Town Board granted an amendment to a Special Permit and preliminary plan approval to Tuxedo Reserve owner (“TRO”) authorizing the construction of a large mixed-use project in a Planned Integrated Development. After a lengthy approval process a neighborhood organization commenced an Article 78 proceeding challenging TRO’s approvals and the associated local laws adopted by the Town Board, claiming the Town Board performed a deficient environmental review process and violated the New York State Open Meetings Law and GML.

With respect to the allegation that the Town Supervisor, the Town Planner, and a member of the Town Board were provided travel accommodations to Florida at TRO’s expense as “impermissible gifts” in violation of GML, the Court held that “[e]ven assuming, arguendo, that the travel and snacks constituted “gifts” within the meaning of GML § 805-a(1)(a), there is no statutory provision pursuant to which a private person has standing to enforce its mandate”

(compare with Public Officers Law § 107(1)). Further, even if such a claim was appropriate the only remedies available are the imposition of a fine, suspension or removal from office (see GML § 805-a(2)), not the annulment of the action.

The court went on to mention that there may be a cause of action to void the determination based on conflict of interest with board members. Notwithstanding, “conduct of which petitioners complain does not rise to the level of a conflict of interest, much less one that was likely to have unduly influenced or otherwise tainted the Town Board’s determination of TRO’s applications.”

When does a legislative official cross the statutory line giving rise to a conflict of interest?

Article 18 of the GML establishes the statutory parameters of conflicts of interest for municipal officials.^{cxiii} GML §§ 801, 802 and 803 limit contractual relationships with municipal officials, § 803 requires disclosure of interests in certain agreements, and § 805-a prohibits certain gifts to municipal officials, as discussed in Tuxedo Land Trust.

Generally, the GML prohibits a municipal official from having an “interest in any contract with the municipality of which he is an officer or employee” and he has power over the contract.^{cxiv} Yet, earlier this year the Second Circuit Court of Appeals reaffirmed that GML conflicts of interest “require[], in addition to illegality, some evil purpose or plan.”^{cxv}

In Friedhaber v. Town Board of Sheldon – a 2007 case – the Town Board and the Zoning board of Appeals approved an energy company’s application to establish a wind farm in their small town. Neighbors of the approved wind farm appealed via an Article 78 proceeding seeking to annul the approvals.^{cxvi} The neighbors’ petition alleged several causes of action including, *inter alia*, that the Town failed to make certain disclosures as required by GML.

Specifically, the neighbors claimed that municipal officers had interests in the wind farm and acted in conflict by voting to approve the variances. They further asserted that such actions mandated the resolutions adopted by the officers constitute contracts and should be void under GML. Further, petitioners assert that that the energy company failed to comply with GML § 809 and thus votes taken by those public officers should be void.

The Town defended these claims by asserting that: (1) Any alleged conflicts of interest were publicly disclosed and publicly debated; (2) The resolutions adopted by the respondent municipal officers are not “contracts” within the meaning of GML § 804; and (3) That only two of the respondent municipal officers had any interest as defined by law in the wind farm project and each such individual disqualified himself from voting on the resolution which pertained to the property in which he was interested. Ultimately the Court held that:

the statutory language makes clear that the resolutions adopted by the ZBA and Board are not “contracts” as referred to in GML § 804 because such resolutions are not within the statutory definition of a

“contract” set forth in GML § 800 (2) (1974 Ops Atty Gen No. I 74-106; Ops St Comp No. 83-114).

In determining whether any of the municipal officials had an “interest” in the wind farm project the Court deferred the statutory language of GML § 800(3), which defines “interest” as “one involving a ‘municipal officer employee’ as well as any matter involving ‘his spouse, minor children and dependents . . .’” In this instance, the “interests” alleged by petitioners are not an “interest” as defined by the GML because the “interests belong to family members not encompassed within that statutory definition.”^{cxvii} Moreover, two Board members did possess an “interest” in the project and properly disqualified themselves from voting on the actions pertaining to the aspects of the project that they would derive a benefit from. Notwithstanding, the board members did not violate GML § 801 by voting to approve actions for the other parts of the project from which they would not receive “direct or indirect pecuniary or material benefit.”

With respect to the neighbors’ claims that two board members failed to file the written disclosures required of board members under GML § 803(1), the Court concluded that the record did not show any such formal written disclosures. The record had an abundant number of references to the interests possessed by both members in the wind farm development, including references in meeting minutes, communications with the boards and media attention. The Appellate Division has held that these types of disclosure are “sufficient to protect the public-interest purpose underlying the statute”.^{cxviii} Although the Court could have invalidated the approvals under common law,^{cxix} in this instance, the Town board members at issue appropriately disqualified themselves matters where they had a conflict and as such their other interest where not “clear and obvious”.

Compare Friedhaber with the decision in Haberman v. ZBA of the City of Long Beach, where the Second Department discussed the disclosure requirement of GML § 809.^{cxx} In Haberman, the ZBA revoked a building permit for the construction of a ten story residential building, which was the second of four such buildings planned for a beachfront apartment complex for which a variance had been obtained in 1985. The permit was modified in 1989 by a stipulation between the parties, and further revised in 1992 pursuant to an agreement. The building permit was revoked based on the ZBA’s finding that the 1992 agreement extending the terms of the variances was unenforceable, because it had not been brought before the ZBA for ratification. The petition to revoke the permit was filed with the ZBA by the entity which owns the only building of the proposed complex that was actually constructed.

On appeal to the Second Department, the owner properly alleged the Chairman had a conflict of interest under GML given he was a rental tenant in the one existing building on the apartment complex site, and as such had a personal interest in seeing that the permit for the proposed building was revoked. The Court concluded that if, as alleged, the Chair was a tenant and, therefore, had a personal interest he should have disclosed this interest as required by GML as he may have inappropriately influenced the board.

Can a conflict arise in the land use process even where the GML is not technically violated?

It is not necessary that a specific provision of the GML be violated to find a conflict of interest.^{cxxi} In Zagoreos v. Conklin, Orange & Rockland Utilities, Inc. applied for a large scale development permit from the Town Board and use and area variances from ZBA to construct several structures necessary to convert two oil-burning generating units into coal-burning units. Certain members of the Town Board and the ZBA were also employees of O&R and those members voted in favor of the proposal. Although there was no direct violation of GML, the Second Department concluded that the approvals “were fatally tainted by the fact that in both cases the decisive votes were cast by board members who were also employees of O&R.”^{cxxii}

In light of the unusual nature of the applications and the substantial controversy surrounding the matter, it was crucial that the public be assured that the decision would be made by town officials completely free to exercise their best judgment of the public interest, without any suggestion of self-interest or partiality. Anything less would undermine the people's confidence in the legitimacy of the proceedings and the integrity of the municipal government. . . .

“[T]he test to be applied is not whether there is a conflict, but whether there might be. . . ‘It is the policy of the law to keep the official so far from temptation as to ensure his unselfish devotion to the public interest’.”^{cxxiii}

Likewise, in Schweichler v. Village of Caledonia, the Fourth Department found that “although there was no technical violation of the GML . . . three of the members of the Planning Board appeared to have impermissibly prejudged [an] application for rezoning inasmuch as they signed a petition in favor of the rezoning and the project.”^{cxxiv} The application received a rezoning of the by the Village Board from R-2 residential district to an R-3 residential district to allow for a multifamily housing project, and a site plan approval from the Planning Board. An owner of adjacent property brought an Article 78/declaratory judgment action seeking to annul the rezoning, the SEQRA negative declaration and the Planning Board’s approval.

The Court concluded that the “appearance of bias and actual bias in this case require annulment of the Planning Board's site plan approval,” noting that the Planning Board chairperson “manifested actual bias when she wrote a letter to the Mayor supporting both the rezoning and the project, noting therein that she “would really like to see new housing available to [her] should [she] decide to sell [her] home and move into something maintenance free.”^{cxxv}

Municipal Planning to Avoid Conflicts of Interest

GML requires local municipalities to adopt a code of ethics. Specifically, § 806(a) states:

The governing body of each county, city, town, village, school district and fire district shall and the governing body of any other municipality may by local law, ordinance or resolution adopt a code of ethics setting forth for the guidance of its officers and employees the standards of conduct reasonably expected of them.

The code should set forth guidance for the municipalities officers and employees and identify the standards of conduct reasonably expected of them, as well as the process for hearing and reviewing complaints alleging conflicts of interest.^{cxxvi}

ⁱ See generally, History of Wireless Communications, available at:

http://www.ctia.org/media/industry_info/index.cfm/AID/10388 (2011)

ⁱⁱ CTIA's Wireless Industry Indices: Semi-Annual Data Survey Results, A Comprehensive Report from CTIA Analyzing the U.S. Wireless Industry, Mid-Year 2012 Results (Semi-Annual Data Survey Results). See also, "CTIA-The Wireless Association Semi-Annual Survey Reveals Historical Wireless Trend" available at <http://www.ctia.org/media/press/body.cfm/prid/2133>.

ⁱⁱⁱ *Id.*

^{iv} CTIA Wireless Quick Facts, available at <http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts> citing *Early Release of Estimates from the National Health Interview Survey, December 2012, National Center for Health Statistics*, June 2013.

^v CTIA Wireless Quick Facts

^{vi} Wireless 911 Services, FCC, available at <http://www.fcc.gov/guides/wireless-911-services>.

^{vii} See *Text-to-911: What you need to know (FAQ)* available at <http://www.cnet.com/news/text-to-911-what-you-need-to-know-faq>. It should be noted that while the carriers have committed to supporting 911 texting in their service areas, text-to-911 will not be available everywhere. Emergency call centers, called PSAPs (Public Safety Answering Points), are the bodies in charge of implementing text messaging in their areas. These PSAPs are under the jurisdiction of their local states and counties, not the FCC, which governs the carriers. See also, *What You Need to Know About Text-to-911* available at www.fcc.gov/text-to-911.

^{viii} Federal Communications Commission ("FCC"), Wireless Emergency Alerts, available at <http://www.fcc.gov/guides/wireless-emergency-alerts-wea>

^{ix} Amanda Lenhart, *Attitudes Towards Cell Phones*, Pew Research, available at <http://www.pewinternet.org/Reports/2010/Teens-and-Mobile-Phones/Chapter-3/Overall-assessment-of-the-role-of-cell-phones.aspx>

^x *Id.*

^{xi} FCC Approves 2 Billion Boost for Wi-Fi in Schools, Bloomberg Businessweek, July 11, 2014 available at <http://www.businessweek.com/news/2014-07-11/fcc-approves-2-billion-boost-for-wireless-internet-in-schools>.

^{xii} LifeBot, available at <http://www.emstelemedicine.com/>; *see also*, LifeStar ACT Ambulatory Cardiac Telemetry, available at <http://www.lifewatch.com/ACT>.

^{xiii} U.S. Food and Drug Administration, Wireless Medical Devices, available at <http://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/ConnectedHealth/WirelessMedicalDevices/default.htm>

^{xiv} Survey Finds Mobile Technologies Saving U.S. Small Businesses More Than \$65 Billion a Year, available at http://about.att.com/story/survey_finds_mobile_technologies_saving_us_small_businesses_more_than_65_billion_a_year.html (dated, May 14, 2014)(small businesses are saving approximately \$67.5 billion a year in time and money due to new technologies, and relying heavily on the use of mobile devices to conduct their business operations).

^{xv} H.R. Rep. No. 104-458, at 206 (1996) (Conf. Rep.).

^{xvi} *See* Wireless Infrastructure: A Time of Regulatory Change in New York, New York Zoning Law and Practice Report (July 2011) (Christopher B. Fisher, Anthony B. Gioffre III, Daniel M. Laub and Troy Lipp); *see also* What's Your Wireless Plan? Federal Law, Local Review and Wireless Facilities, NYSBA Municipal Lawyer, Spring 2012, Vol. 26, No. 2. (Anthony B. Gioffre III, Lucia Chiochio and Daniel M. Laub)

^{xvii} 47 U.S.C. § 332(c)(7)(B)(ii).

^{xviii} “Collocation” is “[t]he mounting or installation of an Antenna on an existing Tower, building, or structure for the purpose of transmitting radio frequency signals for telecommunications or broadcast purposes.” Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, FCC 04-222 (2001), 47 C.F.R. Part I, Appx. B, at B-6; *see*, 47 U.S.C. § 1455(a) (“a State or local government may not deny, and shall approve, any . . . request for modification of an existing wireless tower or base station that involves . . . collocation of new transmission equipment”)

^{xix} *E.g.*, new wireless tower facilities built on raw land.

^{xx} *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, Declaratory Ruling, (Nov. 18, 2009), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-99A1.pdf.

^{xxi} *See* City of Arlington, Tex. v. FCC, 133 S. Ct. 1863 (2013).

^{xxii} *See In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, FCC 14-153 (adopted, October 17, 2014) (the “2014 FCC Order”).

^{xxiii} *Id.* at ¶ 22.

^{xxiv} Crown Castle NGE, Inc. v. Town of Greenburgh, 2013 WL 3357169 (S.D.N.Y. 2013), *aff'd*, 2014 WL 185012 (2d Cir. 2014).

^{xxv} *Id.* at 13; *see also*, *Id.* at FN 9.

^{xxvi} *Id.* at 21.

^{xxvii} *Id.* at 21; *see also*, Bell Atl. Mobile of Rochester L.P. v. Town of Irondequoit, N.Y., 848 F. Supp. 2d 391, 400 (W.D.N.Y. 2012)(wireless application deemed complete upon filing of supplemental papers required for original application triggering Shot Clock prior to 30 day completeness period).

^{xxviii} *See* February 2012 link located at <http://www.whitehouse.gov/briefing-room/signed-legislation>.

^{xxix} “Collocation” is defined by the FCC as “[t]he mounting or installation of an Antenna on an existing Tower, building, or structure for the purpose of transmitting radio frequency signals for telecommunications or broadcast purposes.” *See*, Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (2001), available at 47 C.F.R. Part I, Appendix B (FCC 04-222), Section II (Definitions), ¶ 4, p. B-6.

^{xxx} 2014 FCC Order at ¶ 21.

^{xxxi} *Id.*

^{xxxii} *Id.*

^{xxxiii} *Id.* at ¶ 216.

^{xxxiv} *See* N.Y. Pub. Serv. Law, Article 10, et. al.; *see also* 2011 N.Y. Laws ch. 388.

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- ^{xxxv} See Legislative History, 2011 N.Y. Laws ch. 388., available at http://assembly.state.ny.us/leg/?default_fld=&bn=A08510&term=2011&Summary=Y&Actions=Y&Memo=Y.
- ^{xxxvi} N.Y. Public Service Law § 172(1).
- ^{xxxvii} N.Y. Public Service Law § 168(3)(e).
- ^{xxxviii} N.Y. Public Service Law § 168(3)(e).
- ^{xxxix} See 1997 NY Laws ch. 399.
- ^{xl} New York Public Service Law § 66-j
- ^{xli} New York Public Service Law § 66-j
- ^{xlii} See New York Sun Initiative, available at <http://ny-sun.ny.gov/About/About-NY-Sun.aspx>.
- ^{xliii} See New York Sun Initiative, available at <http://ny-sun.ny.gov/For-Local-Government/Local-Government.aspx> <http://www.cuny.edu/about/resources/sustainability/nyssolar/NYSolarSmartPermitWorkshops/PermitGuidelinesandChecklistNYS.pdf> <http://www.nysesda.ny.gov/About/Newsroom/2013-Announcements/2013-09-20-NY-Sun-Unified-Solar-Permit-to-Streamline-Permitting-Processes-throughout-state.aspx>
- ^{xliv} See New York Sun Initiative, Long Island Unified Solar Permitting Initiative, available at <http://ny-sun.ny.gov/For-Local-Government/Local-Government.aspx>
- ^{xlv} See Town of Brookhaven Code Section 85-13(B).
- ^{xlvi} See 53 A.D.3d 954, 955, 861 N.Y.S.2d 864, 865 (3rd Dep't 2008).
- ^{xlvii} *Id.* at 956, 866.
- ^{xlviii} See 60 A.D.3d 1282, 1283, 875 N.Y.S.2d 359, 361 (4th Dep't 2009).
- ^{xlix} *Id.*
- ¹ See Market Watch, available at <http://www.marketwatch.com/story/morgan-stanley-installs-bloom-energy-fuel-cells-at-purchase-ny-facility-2014-11-14>.
- ⁱⁱ See 23 N.Y.3d 728, 992 N.Y.S.2d 710 (2014).
- ⁱⁱⁱ *Id.* at 746.
- ⁱⁱⁱⁱ *Id.* at 755.
- ^{lv} See No. 12-CV-034S, 2013 WL 5739033, at *1 (W.D.N.Y. Oct. 22, 2013).
- ^{lv} See *Id.*
- ^{lvi} 32 Misc. 3d 1235(A), 938 N.Y.S.2d 225 (Sup. Ct. Wyoming Co. 2010).
- ^{lvii} *Id.* at *12.
- ^{lviii} *Id.*
- ^{lix} *Id.* at 13-14.
- ^{lx} *Id.*
- ^{lxi} *Id.*
- ^{lxii} *Id.* at *17.
- ^{lxiii} *Id.*
- ^{lxiv} *Id.*
- ^{lxv} *Id.* at *18-19.
- ^{lxvi} *Id.*
- ^{lxvii} *Id.*
- ^{lxviii} 101 A.D.3d 716, 955 N.Y.S.2d 175 (2d Dep't 2012).
- ^{lxix} *Id.* at 718.
- ^{lxx} *Id.* at 720.
- ^{lxxi} See 97 A.D.3d 1018, 1018-19, 949 N.Y.S.2d 245 (2d Dep't 2012).
- ^{lxxii} *Id.* at 1020.
- ^{lxxiii} *Id.* at 1019-20.
- ^{lxxiv} *Id.* at 1021.
- ^{lxxv} *Id.*
- ^{lxxvi} *Id.*
- ^{lxxvii} Saratoga Springs Pres. Found. v. Boff, 110 A.D.3d 1326, 1328, 973 N.Y.S.2d 835 (3rd Dep't 2013).
- ^{lxxviii} See 25 Misc. 3d 1115, 887 N.Y.S.2d 499 (Sup. Ct. Yates Co. 2009).
- ^{lxxix} *Id.* at 1120.
- ^{lxxx} *Id.* at 1121.

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- lxxxii *Id.*
- lxxxiii *Id.* at 1121-22.
- lxxxiv *Id.*
- lxxxv *Id.*
- lxxxvi *Id.*
- lxxxvii *Id.*
- lxxxviii 1 N.Y.3d 218, 223-24, 803 N.E.2d 361 (2003).
- lxxxix 7 N.Y.3d 306, 313, 854 N.E.2d 464 (2006).
- xc *Id.*
- xcii *Id.*
- xciii *Id.* at 316.
- xciv 115 A.D.3d 862, 864, 982 N.Y.S.2d 142 (2d Dep't 2014).
- xcv *Id.* at 864.
- xcvi Index No. 1139-14, Westchester County Supreme Court (June 16, 2014).
- xcvii See Ass'n for Prot. of Adirondacks, Inc. v. Town Bd. of Town of Tupper Lake, 64 A.D.3d 825, 827, 882 N.Y.S.2d 534, 537 (3d Dept 2009).
- xcviii See, McKinney's Legislative Law § 1-a, et al. ("State Lobbying Act").
- xcix See, New York State (Temporary) Lobbying Commission Opinion 51, 03-2 (2003).
- c *Id.*
- ci Abyssinian Development Corp. v. Bistricher, 2012 WL 4757388 (N.Y.Sup.), 2012 N.Y. Slip Op. 32499(U).
- cii Commission on Independent Colleges and Universities v. New York Temporary State Commission on Regulation of Lobbying, 534 F.Supp. 489 (N.D.N.Y. 1982); see also Commission on Lobbying v. Simmons, 4 Misc.3d 749, 781 N.Y.S.2d 824 (NY Sup. 2004) ("The Lobbying Act was enacted to gather and disclose information concerning who is attempting to influence the passage of any statute, rule, local law, or ordinance by the Legislature, the Governor, a state agency or a municipality...").
- ciiii See State Lobbying Act § 1-e(a).
- civ See State Lobbying Act § 1-e(b)(i).
- cv See State Lobbying Act § 1-0.
- cvi See also New York Rules of Professional Conduct, Rule 4.2, which is known as the "no-contact" rule states:
- (a) In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.
 - (b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.
- cvii New York State Bar Association Committee on Professional Ethics, Opinion 812 (May 3, 2007).
- cviii *Id.*
- cix *Id.* citing Niesig v. Team I, 76 N.Y.2d 363, 558 N.E.2d 1030 (1990).
- cx Stein v. the Town of Islip Zoning Board of Appeals, 100 A.D.2d 590 (2d Dept. 1984), compare with Logiudice v. Southold Town Bd. of Trustees, 50 A.D.3d 800, 855 N.Y.S.2d 620 (2d Dept 2008) (Board of Trustees cannot rely on local waterfront revitalization program report, which recommended denial of owner's application for special use permit to construct dock, where it was provided after conclusion of hearing; however, in this case Court did not find impropriety as report did not contain any new factual allegations, and was prepared by municipal officer without vested interest in decision and Board did not reference it in decision).
- cxii See GML § 805-a.
- cxiii See State Lobbying Act § 1-c(j).
- cxiv See GML §§ 801, 809.
- cxv GML § 801.
- cxvi Guertin v. U.S., 743 F.3d 382 (2014).

^{cxvi} See Friedhaber v. Town Board of Town of Sheldon, 16 Misc. 3d 1140(A), 851 N.Y.S.2d 58 (Sup. Ct. Wyoming Co. 2007) aff'd, 59 A.D.3d 1006, 872 N.Y.S.2d 361 (App. Div. 2009).

^{cxvii} *Id.* at 7.

^{cxviii} *Id.* citing Stettine v County of Suffolk, 105 AD2d 109, 118 (2d Dept 1984), aff'd 66 NY2d 354 (1985).

^{cxix} See Peterson v Corbin, 275 AD2d 35, 38, 713 N.Y.S.2d 361, 364 (2d Dept 2000)(limiting this doctrine to situations where the conflict of interest is “clear and obvious”).

^{cxx} 94 A.D.3d 997942 N.Y.S.2d 571 (2d Dept. 2012).

^{cxxi} Matter of Zagoreos v Conklin, 109 AD2d 281, 287 (2d Dept. 1985).

^{cxxii} *Id.* at 286.

^{cxxiii} *Id.* at 288(The Court noted, however, O&R failed to comply with GML § 809, which requires that variance applications list the name of any municipal officer who is also an employee of the applicant.)

^{cxxiv} 45 A.D.3d 1281, 1283-1284 (4d Dept 2007).

^{cxxv} *Id.* at 1284.

^{cxxvi} See GML § 806.