Municipal Law Webinar

Daniel Spitzer

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Sarah Main

- SEQRA and Land Use Case Law Update
- Major Renewable Energy Facility Siting Considerations for Municipalities
- E-bikes and E-scooters: Overview of Recent Legislation and Discussion of the Municipal Role

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SEQRA and Land Use Case Law Update

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Standing

- *Schmidt v. City of Buffalo Planning Bd.*, 174 A.D.3d 1413 (4th Dep't 2019)
  - Petitioner sought to annul the City of Buffalo Planning Board's negative declaration with respect to the demolition and reconstruction of an apartment complex.
  - The petitioner alleged he had standing based upon (1) his interest in historic preservation generally; (2) his position as a member of a City advisory board dealing with historic preservation; (3) his interest in photographing the complex; (4) his visits to the complex over the years; and (5) his status as a member of a protected class.
  - "[I]nterest and injury are not synonymous . . . . A general — or even special — interest in the subject matter is insufficient to confer standing, absent an injury distinct from the public . . . ."
  - "Appreciation for historical and architectural sites does not rise to the level of injury different from that of the public at large for standing purposes."
  - The Fourth Department also cited its prior decision in *Turner v. County of Erie*, 136 A.D.3d 1297 (4th Dep't 2016) in holding that the petitioner does not have an injury by virtue of his position on a City advisory board, which is "at most a political impact . . . which does not establish environmental harm."

Standing

- *Cady v. Town of Germantown Plannind Bd.*, 184 A.D.3d 983 (3d Dep't 2020)
  - Property owner and developer applied to PB to subdivide a 6.1-acre parcel in two and for site plan approval for construction of a Dollar General.
  - The project site falls within the Town's scenic viewshed overlay district, designed to protect the Hudson River corridor and Catskill Mountain viewshed.
  - PB declared itself the lead agency, issued a positive declaration, and issued an FEIS and adopted a findings statement and then approved the application.
  - Petitioners, sharing a common boundary with the site, sued, alleging SEQRA violations. Respondents argued Petitioners lacked standing.
  - The court held that Petitioners had standing because their residence is directly adjacent to the site, the proposed store would be directly across the woods from their property, the store's parking lot is in the line of sight of the property, obstructing scenic views.
  - Demonstrated they would suffer an "injury in fact" different that that suffered from the public at large, within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency acted.

Standing

- *Hohman v. Town of Poestenkill*, 179 A.D.3d 1172 (3d Dep't 2020)
  - Barberville Nature Preserve was owned by the Nature Conservancy and designated as "forever wild."
  - Nature Conservancy sought to divest itself from ownership and the Town Board entered into preliminary negotiations to acquire it.
  - SEQRA Type I action because it involved the acquisition of >100 acres of land.
  - TB issued a negative declaration
  - Petitioners commenced an Article 78 proceeding challenging the negative declaration, which was dismissed by the trial court for lack of standing.
  - The Third Department affirmed. Petitioner must suffer direct harm, injury that is in some way different from that of the public at large.
  - Must be more than "generalized environmental concerns."
  - Here, claim of standing based on the fact that Petitioners own property directly adjacent to the nature preserve and that the Town failed to consider increased traffic and the impacts of new parking lot and hiking trail.
  - Even assuming they own property adjacent, that alone is not enough. Must have allegations of unique or distinct injury that petitioners will suffer as a result of the acquisition that is not generally applicable to the public at large.

Standing

- *Vasser v. City of New Rochelle*, 180 A.D.3d 691 (2d Dep't 2020)
  - Petitioners commenced an Article 78 proceeding to challenge various approvals and determinations by the City to permit the construction and operation of a senior citizen residence.
  - Located 1,200 feet to 1,800 feet from Petitioners' homes.
  - Respondents moved to dismiss for lack of standing; dismissed for lack of standing at trial court.
  - Second Department affirmined, finding that proximity presumption did not apply. Petitioners' properties were located several streets and building lots away and were separated by another housing complex.
  - Speculative and unsubstantiated claims of potential harm alleged in the petition failed to make the requisite showing that Petitioners' would suffer any direct injury-in-fact different in kind or degree from that experienced by the public at large.

SEQRA Hard Look

- *Van Dyk v. Town of Greenfield Planning Bd.*, 2021 WL 54806 (3d Dep't 2021)
  - In 2003, applicant received approval from the PB for a four-phase development to construct a manufacturing and distribution center.
  - In 2017, the applicant sought to modify phase four of the plan to construct a warehouse in lieu of a previously approved parking lot.
  - PB issued a SEQRA negative declaration and approved the application.
  - Petitioners (neighbors) sought to annul the approvals on the ground that the PB violated SEQRA by failing to address the stormwater and wetland impacts. Trial court dismissed the petition.
  - Third Department affirmed, noting that the applicant submitted an updated SWPPP, stormwater management report prepared by its engineers, geotechnical report regarding excavation near the pond system, and downstream drainage analysis. Town engineer reviewed and provided his opinion that the existing pond system could handle increased stormwater runoff.
  - PB also took a hard look at the wetlands issue.

SEQRA – Supplemental EIS

- *McGraw v. Town of Villenova*, 186 A.D.3d 1014 (4th Dep't 2020)
  - Town approved a large-scale wind project in 2016, following a lengthy approval process, including a supplemental environmental impact statement (SEIS). In 2018, the developer sought to modify the project by, among other things, increasing the height of turbines.
  - Town Board issued a negative declaration and approved the application.
  - Petitioners commenced an Article 78 proceeding challenging the negative declaration, arguing that a second SEIS should have been prepared. The trial court annulled the negative declaration.
  - The Fourth Department reversed, noting that an SEIS may be required to address ***specific significant*** adverse environmental impacts arising from project changes. You also look to the state of the information in the EIS.
  - An agency's determination whether to require a SEIS is discretionary.
  - Fourth Department found that won took a hard look at the areas of environmental concern.

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SEQRA Determination and Zoning Decision

- *Biggs v. Eden Renewables*, 188 A.D.3d 1544 (3d Dep't 2020)
  - Developer applied for a special use permit and site plan approval to construct a solar energy facility.
  - PB, as SEQRA lead agency, conducted a lengthy review, consisting of review of plans, requests for additional information from the developer, and held public hearings and public Q&A sessions that the developer responded to.
  - PB issued a SEQRA negative declaration and issued a special use permit and approved the site plan.
  - Petitioners commenced an Article 78 proceeding, alleging that the PB failed to make findings under the Zoning Code regarding its approval of the special use permit and site plan.
  - Case improperly transferred to the Third Department by the trial court.
  - The Court held that the PB did indeed make sufficient findings under the local law, relying on the findings made in the negative declaration where the factors overlapped. The Court found this to be appropriate.
  - Decision was rational.

SEQRA - Segmentation

- *Court Street Development Project, LLC v. Utica Urban Renewal Agency*, 188 A.D.3d 1601 (4th Dep't 2020)
  - Respondent made determination and findings under EDPL Article 2 to acquire certain real property – one of four parcels on which the Northland Building in Utica is situated. The building has been vacant since 2016.
  - EDPL § 207 original proceeding in Fourth Department. "Very limited."
  - "We must either confirm or reject the condemnor's determination, and our review is confined to whether (1) the proceeding was constitutionally sound; (2) the condemnor had the requisite authority; (3) its determination complied with [SEQRA] and EDPL article 2; and (4) the acquisition will serve a public use."
  - Petitioner challenged, among other things, on the basis that Respondent engaged in improper segmentation during the review, since only the acquisition was evaluated and not the redevelopment of the entire site.
  - Court rejected this argument, holding that since no specific future use had been identified prior to acquisition, Respondent was not required to consider the environmental impact of anything beyond the acquisition.

SEQRA – Agency Deference

- *Davis v. Zoning Bd. of Appeals of City of Buffalo*, 177 A.D.3d 1331 (4th Dep't 2019)
  - Developer applied for construction of a mixed-use, four-story building in the City of Buffalo, which required the demolition of 14 existing structures within a district listed on the National Register of Historic Places.
  - PB was the SEQRA lead agency and issued a positive declaration and FEIS.
  - The positive declaration was issued on the basis of SHPO's comment that the project would "significantly and negatively" alter the character of the surrounding historical districts.
  - In its findings, the PB disagreed with SHPO and concluded that demolition of the structures would not have a significant adverse impact on historic resources.
  - "The record reflects that the Planning Board conducted a lengthy and detailed review of the project, including its evaluation of the potential impacts to historic resources, and its written findings demonstrate that it provided a reasoned elaboration for its determination. Its determination must be upheld inasmuch as it is not arbitrary, capricious, or unsupported by substantial evidence."

Short-term Rentals

- *Cradit v. Southold Town Zoning Bd. of Appeals*, 179 A.D.3d 1058 (2d Dep't 2020)
  - In 2006, petitioner purchased property in a low density residential zoning district.
  - In 2014, she began using the property for short-term rentals.
  - In 2015, the Town amended its zoning code to prohibit transient rental properties in all districts.
  - Thereafter, petitioner received notices of violations and sought a determination from the ZBA that her use of the property for short-term rentals was a pre-existing, legal, non-conforming use.
  - ZBA determined that her use of the property was similar to a hotel/motel use, which had never been permitted, rather than the permitted use of a one-family dwelling. Thus, no legal non-conforming use.
  - Court agreed with the ZBA that petitioner's use of her property was not a legal non-conforming use. Renting property on a short-term basis, she was not using the residence as a one-family dwelling. ZBA correctly determined that her use was similar to a hotel/motel use.

Short-term Rentals

- *W. 58th St. Coal., Inc. v. City of New York*, 188 A.D.3d 1 (1st Dep't 2020).
  - Petitioners brought an Article 78 proceeding, seeking to annul the City's determination to open a homeless shelter at the former Park Savoy Hotel.
  - The Court held that the building was properly classified as a non-transient apartment hotel because the occupants would, on average, occupy the units for more than 30 days.
  - The Court further held that the petitioners had raised a question of fact as to whether the configuration of the building would allow adequate access by firefighters. Accordingly, the Court ordered a hearing on whether the building's use was consistent with general safety and welfare standards.

Short-term Rentals

- *Wallace v. Town of Grand Island*, 184 A.D.3d 1088 (4th Dep't 2020).
  - Petitioner commenced an Article 78 proceeding and declaratory judgment action, seeking a declaration that a zoning law prohibiting short-term rentals in certain zoning district constituted a regulatory taking.
  - The court held that the petitioner failed to provide "dollars and cents proof" that "the subject premises was not capable of producing a reasonable return on his investment or that it was not adaptable to other suitable private use."
  - The court observed that the petitioner was not precluded from selling the property at a profit, or from renting it on a long-term basis.
  - Finally, the court noted that even if the petitioner successfully established a regulatory taking, the proper relief for his claim would have been a hearing on just compensation, not invalidation of the law.

Short-term Rentals – Special Use Permits

- *Churchill v. Town of Hamburg*, 187 A.D.3d 1559 (4th Dep't 2020).
  - Property owners wished to use their property as an Airbnb.
  - The Town of Hamburg ZBA interpreted the Town Code as not to allow a tourist home to be a permitted principal use in the R1 zoning district and that a use variance is required before applying for a special use permit.
  - R1 zone included a reference to uses permitted in R-E district, which allowed tourist homes and bed-and-breakfasts.
  - The Fourth Department concluded that the ZBA failed to apply the clear language of the Town Code's relevant provisions, stating that "[a] plain reading of sections 280-24 and 280-31 … unambiguously demonstrates that special uses are permitted uses, subject to authorization by the Planning Board."
  - You don't need a use variance for specially permitted uses.

Mootness

- *Sierra Club v. New York State Dep't of Envtl. Conserv.*, 169 A.D.3d 1485 (4th Dep't 2019).
  - Renovation of a power plant that burned coal, went inactive temporarily, and was bought by a company that sought to operate it using natural gas and biomass.
  - DEC issued an amended negative declaration for the air permits. DPS issued a notice to proceed with construction of a natural gas pipeline necessary to operate the plant.
  - Petitioners commenced an Article 78 proceeding, alleging SEQRA violations and seeking to vacate the air permits.
  - Petitioners did not request a TRO immediately. They waited months to do so. Oral argument was held and Supreme Court reserved decision. Construction was completed before Supreme Court issued a decision denying petitioners' motion and granting Respondents' motions to dismiss.
  - Petitioners filed a notice of appeal but did not seek an order enjoining operation of the plant. They perfected the appeal nearly 9 months later.
  - Respondents moved to dismiss the appeal as moot.
  - Fourth Department dismissed the appeal as moot.

Protest Petitions and Buffer Zones

- *Dodson v. Town Board of Town of Rotterdam*, 182 A.D.3d 109 (3d Dep't 2020).
  - Plaintiffs own residential properties adjacent to or opposite a parcel of land that was rezoned by a 3-2 vote from agriculture to senior living district.
  - Before the vote, plaintiffs submitted protest petitions to the rezoning, which the Town Board rejected.
  - Plaintiffs sued, arguing that a supermajority vote was required.
  - First rezoning request included the whole parcel. Revised request carved out a 100-foot buffer area around the property to be rezoned. The Court of Appeals has held that the 100 feet must be measured from the boundary of the rezoned area, not from the boundary line of the property in which the rezoned area is located. Thus, it is permissible for property owners who seek rezoning to protect themselves from the supermajority requirement by creating a buffer zone at least 100 feet wide between the rezoned area and the property line.
  - **But**, the buffer area would include improvements (ways, utilities, stormwater management facilities, berms, grading and landscaping, as well as an emergency access way) that would serve the project. Case of first impression.
  - Because the improvements will serve only uses in the rezoned area and there will otherwise be no public benefit, the buffer zone cannot defeat the supermajority requirement.
  - Rezoning invalid.

Incentive Zoning

- *Save Monroe Ave., Inc. v. Town of Brighton*, 179, A.D.3d 1496 (4th Dep't 2020)/ *Brighton Grassroots, LLC v. Town of Brighton*, 179 A.D.3d 1500 (4th Dep't 2020).
  - Petitioners challenged the validity of the Town's incentive zoning law on the ground that it lacked any specific system for granting incentives or determining the sufficiency of amenities.
  - The Court dismissed the challenges, holding that Town Law § 261-b does not require an incentive zoning law to specifically adopt a prospective formula for weighing the costs and benefits of awarding any particular incentive under the law.

Nonconforming Use

- *HV Donuts, LLC v. Town of LaGrange Zonign Bd. of Appeals*, 169 A.D.3d 678 (2d Dep't 2019).
  - A nonconforming gas station was closed for more than one year for remediation efforts after a tanker truck accident and subsequent gasoline spill.
  - The owner of the gas station applied to re-open the gas station and for a permit to upgrade the convenience store building, which had not been damaged by the spill and remediation efforts.
  - The Building Inspector initially granted the permits under the zoning code's allowance for rebuilding after casualties, and it granted the gas station a year from the date of its request to reestablish operations.
  - The Dunkin' Donuts across the street appealed. The ZBA affirmed, and the court agreed, holding that the remediation work was sufficient to show that the nonconforming use was never discontinued.

Area Variance or Use Variance?

- *Route 17K Real Estate, LLC v. Zoning Bd. of Appeals of Town of Newburgh*, 168 A.D.3d 1065 (2d Dep't 2019).
  - A hotel developer applied to the ZBA for area variances, which were granted.
  - One of the variances sought relief from a zoning law, which requires hotels to have their principal frontage on a state or county highway.
  - The petitioner challenged the determination, arguing that the ZBA improperly classified the request as for an area variance as opposed to a use variance.
  - The Second Department affirmed the ZBA's area variance classification, finding the "principal frontage" requirement to be a physical requirement. The ZBA considered all of the relevant statutory factors, and the decision to grant the variances was rational.

Project Changes and Procedural Requirements

- *Favre v. Planning Bd. of Town of Highlands*, 185 A.D.3d 681 (2d Dep't 2020).
  - Development application for a hotel; site plan and special exception use permit.
  - Revisions made to the plan after the public hearing.
  - PB issued a negative declaration and granted the application.
  - Neighboring property owner sued, alleging that the PB was required to hold an additional public hearing after the project changes and that a re-referral under GML § 239-m was required.
  - Second Department rejected those arguments, holding that the changes were insubstantial. There was no expansion or change to the basic layout or dimensions of the project.
  - Re-referral under GML § 239-m is only required where "the revisions are so substantially different from the original proposal."

Multiple Municipal Board Approvals

- *Livingston Dev. Grp., LLC v. Zoning Bd. of Appeals of Vill. of Dobbs Ferry*, 168 A.D.3d 847 (2d Dep't 2019)
  - Petitioner submitted an application for site plan approval to the PB to construct two buildings, each consisting of 6 condominium units, on a parcel overlooking the Hudson River.
  - PB conducted a view analysis and recommended the Board of Trustees grant site plan approval. The Trustees followed the PB recommendation, subject to approval from the Village Architectural and Historic Review Board (AHRB).
  - AHRB denied approval on the ground that the buildings were excessively dissimilar to the character of the surrounding area. Petitioner appealed to the ZBA, which confirmed the AHRB's decision.
  - Petitioner commenced and Article 78 proceeding, arguing the AHRB/ZBA exceeded their authority by considering the impact of the project on the views of the Hudson, while the PB as the "lead agency" charged with reviewing for consistency with the LWRP already conducted its viewshed analysis.
  - AHRB/ZBA's decisions based on other factors, petition dismissed.

Multiple Municipal Board Approvals

- *Pittsford Canalside Properties, LLC v. Village of Pittsford Zoning Bd. of Appeals*, 181 A.D.3d 1235 (4th Dep't 2020).
  - A development project received approvals from the Board of Trustees and PB, but was denied by the Architectural Preservation and Review Board (APRB) on the ground that the project's size, mass, and scale were incompatible with the Village's historic district. The developer appealed the denial to the ZBA and the ZBA affirmed the APRB decision.
  - The developer challenged the denial on the basis that the APRB lacked jurisdiction over size, mass, and scale because the zoning code allowed it.
  - The parties exchanged settlement proposals and the trial court found a settlement had occurred and removed size, mass, and sale from the APRB's jurisdiction.
  - The Fourth Department reversed, holding no settlement had occurred and noted that the trial court improperly intruded into the APRB's administrative domain.

Public Trust Doctrine

- *Brighton Grassroots, LLC v. Town of Brighton*, 179 A.D.3d 1500 (4th Dep't 2020); *Clover/Allen's Creek Neighborhood Ass'n LLC v. M&F, LLC*, 173 A.D.3d 1828 (4th Dep't 2019).
  - Petitioners sued to challenge parkland alienation by allowing construction of a development project over a public trail.
  - Trial court had held that the public trust doctrine was not applicable to real property interests that were held in less than fee simple absolute. Here, the Town owned easements, required to be kept in "park-like condition."
  - The Fourth Department found that the application of the public trust doctrine does not depend on whether the municipality holds the property in fee simple or whether the municipality's property interest is subject to the rights of others.
  - Express or implied dedication.
  - Fourth Department found issues of fact, requiring discovery and trial.

Contract Zoning

- *Neeman v. Town of Warwick*, 184 A.D.3d 567 (2d Dep't 2020)
  - Petitioners own land in a rural zoning district in the Town, adjacent to a campground, which was approved in 1965 for 74 campsites.
  - Over the years, without permits, variance, or other approvals, the campground expanded from 74 campsites to 154 and constructed other accessory buildings.
  - The Town issued numerous violations and commenced civil enforcement proceedings. The Town and campground entered into a "Development Agreement" to settle the dispute, whereby the Town would agree to amend its zoning code to increase time limit to stay at campground from 120 days to 210 days and would not take further actions to modify the code until after the campground secured its further approvals.
  - The campground sought variances and other approvals to come into compliance. It also applied for site plan approval and a special use permit.
  - PB issued a SEQRA negative declaration.
  - Second Department invalidated the negative declaration because it did not address the impact of expansion; it merely took the illegal expansion as existing with no consideration.
  - The Second Department also found that the Development Agreement constituted illegal contract zoning.

Interpretation Appeals - ZBA

- *Fox v. Town of Geneva Zoning Bd. of Appeals*, 176 A.D.3d 1576 (4th Dep't 2019)
  - The petitioner sought to annul a determination that found a breakwall, septic system retaining wall, and north side retaining wall on the petitioner's lakefront property constituted fences under the definition in the Town Code, and that the petitioner's property was therefore in violation of the Town Code's fence regulations.
  - The Court first explained that it was not required to defer to the ZBA regarding whether the aforementioned walls fell within the Town Code's definition of fences because "the issue posed is susceptible to resolution as a matter of law by interpretation of the Code terms."
  - It then found that the undisputed evidence reflected that the walls did not fall within the plain meaning of fences because they were not intended for the purpose of enclosing or dividing a piece of land. Rather, the breakwall was constructed to maintain the shoreline of the lake in light of the future construction of a house on the petitioner's property, the septic system retaining wall was constructed to secure the integrity of the proposed leach field, and the north side retaining wall was constructed to provide better drainage and avoid soil erosion.
  - Accordingly, the court held that the ZBA's determination lacked a rational basis and was not supported by substantial evidence.

Generalized Community Opposition

- *209 Hudson St., LLC v. City of Ithaca Bd. of Zoning Appeals*, 182 A.D.3d 851 (3d Dep't 2020)
  - The petitioner owned property in the City of Ithaca and applied to subdivide the lot so that it could construct a new multi-family dwelling.
  - Due to a side yard deficiency, the petitioner also applied for an area variance, which was denied by the ZBA.
  - The Third Department found the ZBA's denial to be irrational.
  - The ZBA noted that an environmental review of the proposed project concluded that there would be no significant impacts to, among other things, aesthetic or historic resources, the air, land, drainage or open space area. The findings also indicated that the City of Ithaca Planning Board, at best, gave an equivocal opinion about the proposed project. In this regard, the findings stated that the Planning Board was "unsure" whether the requested variance was consistent with the neighborhood and that it was "conflicted" about petitioner's appeal to respondent. Furthermore, petitioner's proposed use of the property was a permitted use in the neighborhood.
  - In addition, the record contains comments from individuals in the neighborhood—some of which supported and some of which disapproved of petitioner's request. Yet, respondent's consideration of the requisite factors rested primarily on the opposing comments provided by those individuals living in the neighborhood. Given that the views of the community in opposition to petitioner's request by itself does not suffice to deny a variance, respondent's determination lacks a rational basis.

Power to Impose Conditions

- *McFadden v. Town of Westmoreland Zoning Bd.*, 175 A.D.3d 1098 (4th Dep't 2019)
  - The petitioners wanted to lease their residentially zoned land as a dog training facility, which was not specifically permitted under the zoning laws.
  - The ZBA conditionally granted a use variance, prohibiting overnight boarding and limiting the number of dogs on the property at any time to six.
  - The Supreme Court upheld the determination, and the petitioners appealed, arguing that they did not need a use variance and that conditions were therefore improper.
  - The Fourth Department found that the use was not permitted, nor could it be classified as a customary "home occupation," because the Petitioners were leasing land – not their residence – for the training facility.
  - Town Law § 267–b empowers the ZBA to place reasonable conditions on variance recipients, and these conditions were appropriate.

Questions?

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Major Renewable Energy Facility Siting Considerations for Municipalities

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Accelerated Renewables Act

- The Accelerated Renewable Energy Growth and Community Benefit Act (the “Act”) was passed in April 2020.
- Creates a new section of the Executive Law that overhauls the State’s siting process for large-scale renewable energy projects (>20 MW);
- Creates a centralized, uniform permitting regime for these projects to be administered by a new Office of Renewable Energy Siting (ORES) within the NYS Department of State (DOS);
- Establishes a Clean Energy Resources Development and Incentive Program to be administered by NYSERDA.

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Required Regulatory Proceedings

- Directs the Public Service Commission (PSC) to initiate a proceeding to provide Host Community Benefits.
  - The PSC opened Case No. 20-E-0249 – In the Matter of a Renewable Energy Facility Host Community Benefit Program on May 29, 2020.

- Directs the Department of Public Service (DPS) to conduct a system-wide grid study.
  - The PSC opened Case No. 20-E-0197 – Proceeding on Motion of the Commission to Implement Transmission Planning Pursuant to the Accelerated Renewable Energy Growth and Community Benefit Act on May 14, 2020.

- Directs the PSC to initiate a proceeding to expedite the Article VII transmission siting process.

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Section 94-c Permitting Procedure

Permit Application

- Significantly streamlines permitting process compared to Article 10
  - Eliminated Public Improvement Plan or Preliminary Scoping Statement required under Article 10;
  - Thereby shortens the pre-application timeline by 240 days;

- ORES determination of completion within 60 days. Applicants may agree to longer review periods;

- Requires meeting with community members no less than 60 days before filing an application;

- Complete application requires proof that applicant consulted with local municipalities about requirements of local law, along with any presentation materials;

- Application must be accompanied by a fee deposited in the local agency account for local agency and potential community intervenors;

- Municipalities must submit a statement to ORES indicating whether the project complies with local law.

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Permitting Procedure Continued

Uniform Permit Conditions

- ORES publishes draft permitting conditions for public comment within 60 days of complete application;
  - If the comments, including those from the municipality, raise substantive and significant issues, ORES must hold an adjudicatory hearing;
  - If the project does not comply with local law and no adjudicatory hearing is held, then the DOS must hold a public hearing statement in the affected municipality.
- The proposed regulations issued on September 16, 2020 include uniform standards and conditions for wind and solar projects, which include conditions for setbacks, noise, visual impacts, among others.
- Before uniform conditions are adopted, ORES must hold 4 public hearings throughout the State.

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Permitting Procedure Continued

Site-Specific Conditions

- Site-specific mitigation is required if impacts of project cannot be addressed by uniform standards.

- This is very important point for local planners to understand.
- Important to point out local critical environmental areas, other areas of concern to developer and ORES.
- Important to have evidence to support site-specific requests.
  - For example, does your comprehensive plan support your request?

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Permitting Procedure Continued

Final Permits

- ORES must make final determination within 1 year of complete application or 6 months if on a ‘priority’ site, otherwise automatically approved.
  - Priority sites are “existing or abandoned commercial use,” including brownfields, landfills, dormant electric generating stations, and abandoned properties.

- All final permits require a host community benefit. Permittees and host community can agree to the type of benefit that will be provided. If they do not, ORES or PSC can decide.

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Change in “Unreasonably Burdensome” Standard

- Similar to the Article 10 process, ORES can waive the application of local laws that are “unreasonably burdensome”; however, Section 94-c creates a broader standard.

- Article 10: “unreasonably burdensome” is judged in light of “existing technology or needs of or costs to ratepayers”.

- Section 94-c: “unreasonably burdensome" is judged in light of the State’s CLCPA targets

- This means more flexibility for ORES to waive a local law than what is currently afforded to the Article 10 Siting Board.

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Host Community Benefit Program

- Staff Whitepaper issued September 23, 2020 proposes a statewide bill credit program whereby owners of Major Renewable Energy Facilities pay an annual fee that would be distributed equally among customers in a host community as a bill credit.
- A “host community” is one in which a Major Renewable Energy Facility will be sited.
- If there is more than one Facility in a host community, customers would receive rebates from both projects.
- $500/MW annual fee for solar projects; $1,000/MW for wind projects for the first 10 years of operation.
- If there
- These discounts are in addition to any NYSERDA incentives for property owners and host communities.
- Municipalities may continue to negotiate PILOTs and HCAs for additional benefits.

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NYSERDA Build-Ready Program

- NYSERDA will obtain permits and interests, and transfer sites it deems suitable for siting a renewable energy project.
- An RFI to nominate sites is open on NYSERDA's website.
  - NYSERDA advanced 5 sites as Build-Ready Sites.
- Preference must be given to 'difficult to develop' sites (e.g. brownfields, landfills, dormant generating sites).
- May assess natural conditions at the site, current land uses, availability of transmission facilities, and other factors consistent with the CLCPA goals.
- Developers will be selected via competitive bidding process.
- NYSERDA works with State partners and local communities to advance new projects that include a Build-Ready Community Benefits Package, which may include grant funding and local workforce development opportunities.

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Role of Local Communities

- Section 94-c application statement requirement does not address what happens if a municipality does not submit a statement.
- Applicants must pay fees to a NYSERDA-administered local agency account for municipalities to participate in public proceedings.
- ORES may elect not to apply any local law or ordinance, in whole or in part, that is ‘unreasonably burdensome’ in view of CLCPA targets and environmental benefits of the project.
- No other permits required if municipality receives notice.
- Projects 20-25 MW may opt-out of local zoning and SEQRA process.
- No requirement to consult with NYSERDA on PILOT amounts or real property tax assessments. 60-day notice requirement under RPTL § 487(9)(a) still applies.
- Raise project-specific siting concerns during community meetings.

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Role of Planners & Consultants

- Engage with developers and municipalities in the pre-application phase;
- Participate in stakeholder meetings;
- Advise municipalities on draft permit conditions when they are noticed for public comment;
- Provide support to local officials seeking who want to upgrade their plans or regulations in light of the new law;
- Assist municipalities in determining host community benefits.

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E-bikes and E-scooters: Overview of Recent Legislation and Discussion of the Municipal Role

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Micromobility Advances in NY

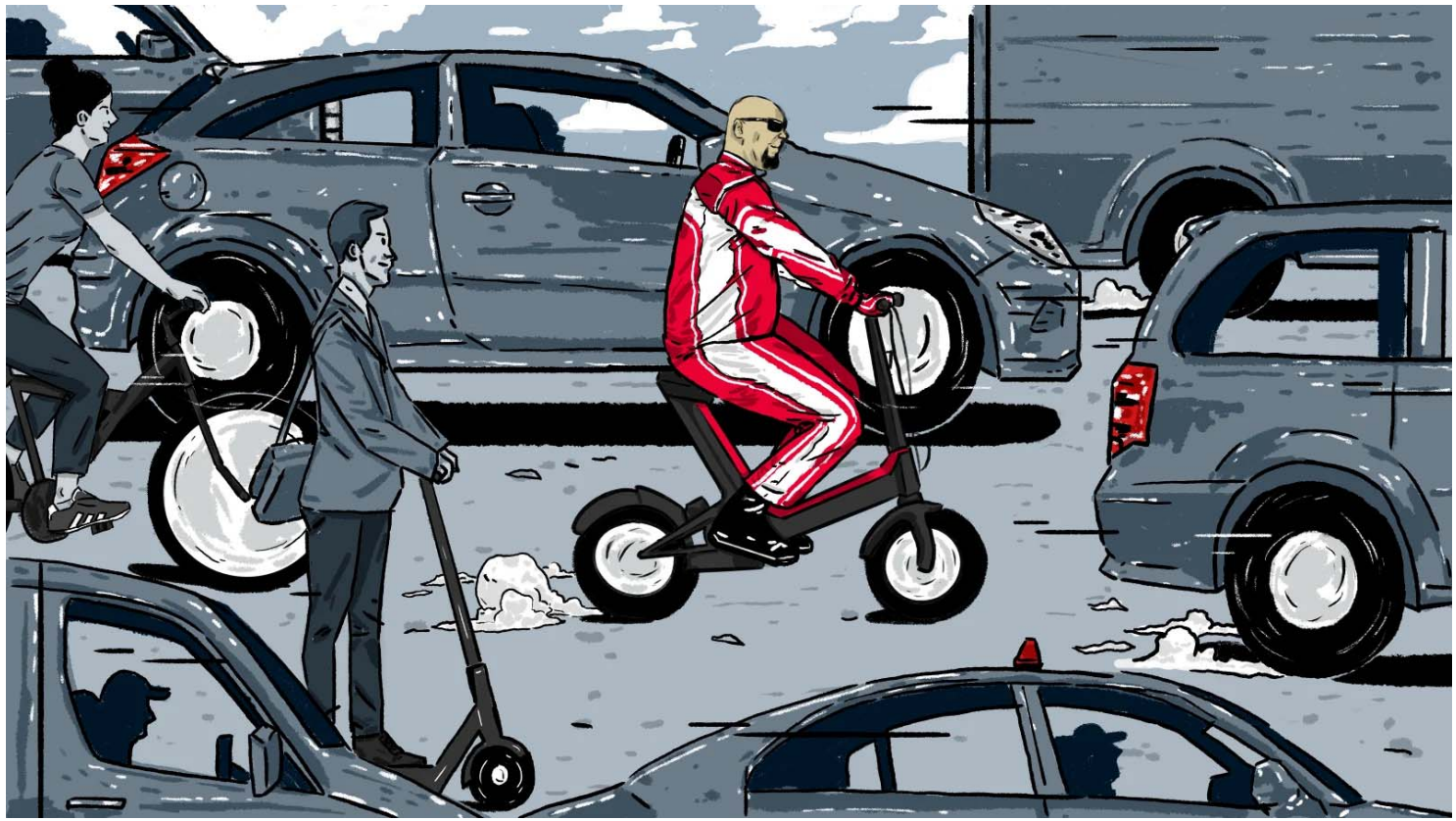

Illustration: Benjamin Currie (G/O Media)

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Legalizing E-Bikes/E-Scooters

- New York has finally permitted E-Bikes and E-Scooters, providing a boost for micromobility options.
- Many individuals have expressed concerned with public transit options post-lockdown and increased personal travel options are needed.
- The news are effective August 2, 2020, and they grant municipalities regulatory powers, including the ability to ban or limit the use of Ebikes and E-Scooter
- Municipalities can regulate ride-sharing companies
- Municipal powers also include setting a lower maximum speed and banning e-bikes and e-scooters completely.

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E-Bikes

- New Vehicle and Traffic Law § 102–c. defines E-Bikes as a "Bicycle with electric assist" as one of three classes:

- A bicycle which is no more than thirty-six inches wide and has an electric motor of less than seven hundred fifty watts, equipped with operable pedals, meeting the equipment and manufacturing requirements for bicycles adopted by the Consumer Product Safety Commission under 16 C.F.R. Part 1512.1 et seq. and meeting the requirements of one of the following three classes:

Classes of E-Bikes

- (a) “Class one bicycle with electric assist.” A bicycle with electric assist having an electric motor that provides assistance only when the person operating such bicycle is pedaling, and that ceases to provide assistance when such bicycle reaches a speed of twenty miles per hour.
- (b) “Class two bicycle with electric assist.” A bicycle with electric assist having an electric motor that may be used exclusively to propel such bicycle, and that is not capable of providing assistance when such bicycle reaches a speed of twenty miles per hour.
- (c) “Class three bicycle with electric assist.” **Solely within a city having a population of one million** or more, a bicycle with electric assist having an electric motor that may be used exclusively to propel such bicycle, and that is not capable of providing assistance when such bicycle reaches a speed of twenty-five miles per hour.

E-Scooters

- Newly added Vehicle and Traffic Law § 114–e defines an “Electric scooter” as “Every device weighing less than one hundred pounds that (a) has handlebars, a floorboard or a seat that can be stood or sat upon by the operator, and an electric motor, (b) can be powered by the electric motor and/or human power, and (c) has a maximum speed of no more than twenty miles per hour on a paved level surface when powered solely by the electric motor.”

Shared Ride Services

- There are a number of popular services. Many closed down during the pandemic but are re-opening
- Municipalities can license or ban such companies, designate docking/hub areas, establish permitting requirements
- Consider a pilot program:
  - *Pilot program. The city hereby establishes a one year pilot program (the "program") under whichcompanies may operate dock-based or dock-less motorized scooter share services byreservation through an online application, software, or website, for point to pointtrips, within designated areas of the City of Orlando*
- Municipalities can include fees as part of the license program to cover its costs, and related costs.

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Regulating E-Scooters/E-Bikes

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Shared Ride Services Best Practices

- Shared micromobility services should be only allowed to operate in the public right-of-way with legal permission (e.g. license, permit, contract) from the local government.
- Company must designate will be responsible for fielding complaints, addressing technical difficulties, coordinating the rebalancing and removal of scooters parked illegally and providing public education.
- The city should reserve the right to:

• Terminate permits at any time, for due cause, including causes not specified in the regulatory agreement, and require the operator to remove their entire fleet of vehicles from city streets.

• Limit the number of companies operating (e.g. cap the number of permits or licenses issued,,and/or issue exclusive contracts, permits, or licenses).

• Limit the number of vehicles that any individual company can deploy, on a per-permit basis.

• Prohibit specific companies from operating in the public right-of-way based on conduct or prior conduct (e.g. if a company deploys equipment prior to applying for a permit, license, or contract, or fails to comply with permit, contract, or license terms).

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Shared Ride Services Best Practices

- Cities should limit the duration of licenses and permits to a fixed time period (e.g. 6-12 months) and require all companies to re-apply for each renewal.
- Contracts developed as the result of competitive bidding processes may have a longer duration.
- Contracts should reseve the right to update permit terms over time.
- Cities should require that operators provide written notice, at least 14 days before ceasing operations, if they are no longer willing or able to provide service in the city.

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Data Collection

- An issue has arisen over data collected by the ride-sharing companies being shared with the government.
- The license agreement has to provide that sufficient data will be collected to provide auditable proof that the licensee has paid applicable costs.
- Disputes have arisen in cities with sophisticated data collection systems, Los Angeles in particular, which requires (without personal information) the location of each trip start, end, and the route taken to get from A to B, as a part of its of the scooter PILOT program
- Jump refused to comply and lost its license. The ACLU is suing LA asserting constitutional privacy rights may be violated.

Questions?

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Thank You!

An email will follow with links to the presentation slides, presentation recording and a code for CLE credits.

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