Wind Energy Development:

Ensuring that a Municipality Does Not Get Caught in the Crosswinds

(Hot Topics for Municipalities)

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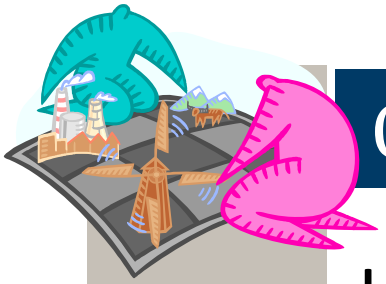

Outline

Hot topics for municipalities:

- Classification of wind energy projects as public utilities.
- Impact of classification as public utility on municipal zoning authority, and zoning authority in general.
- Acceptable mitigation measures to ensure benefits to community outweigh community impacts.

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Treatment of Wind Energy Projects as Public Utilities

Developers seek public utility status because of the "relaxed" zoning standard.

- Adopted in *Consolidated Edison Company of New York v. Hoffman,* 43 N.Y.2d 598, 403 N.Y.S.2d 193 (1978).
  - A municipality "may not exclude a public utility from its community where the utility has shown a need for its facilities[.]"
  - Requires showing only that "modification is a public necessity in that it is required to render safe and adequate service, and that there are compelling reasons, economic or otherwise, which make it more feasible to modify the plant than to use alternative sources of power such as may be provided by other facilities."
  - Standard for a variance should be lowered further "where the intrusion or burden on the community is minimal[.]"

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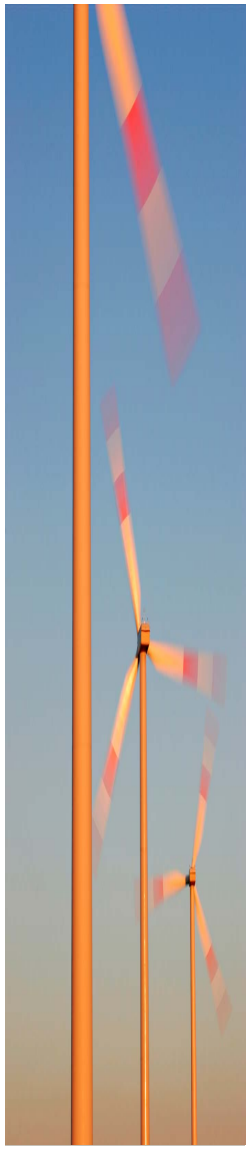

Treatment of Wind Energy Projects as Public Utilities

To qualify as a public utility, wind project must satisfy three-part test established in *Cellular Telephone Company, Doing Business as Cellular One v. Rosenberg,* 82 N.Y.2d 364, 604 N.Y.S.2d 895 (1993):

- the essential nature of the services offered, which must be taken into account when regulations seek to limit expansion of facilities which provide the services,
- "operat[ion] under a franchise, subject to some measure of public regulation," *and*
- logistic problems, such as the fact that "[t]he product of the utility must be piped, wired, or otherwise served to each user…[,] the supply must be maintained at a constant level to meet minute-by-minute need[, and] [t]he user has no alternative source [and] the supplier commonly has no alternative means of delivery."

Treatment of Wind Energy Projects as Public Utilities

- "Essential nature" of services
  - Is the power produced by wind projects essential?
    - Ample competition
    - Electricity generated by wind turbines may not be sold if cheaper electricity is available

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Treatment of Wind Energy Projects as Public Utilities

- Operation under a franchise, subject to some measure of public regulation
  - Wind energy projects are owned by private developers and run as commercial enterprises.
    - The New York State Public Service Commission (PSC) has stated that "virtually all [electric] generation units … are 'non-utility' owned."
  - Wind energy projects are not operated pursuant to a franchise from a public entity.
  - State and federal government support, but no mandate and no uniform government regulation.

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Public Regulation (cont'd)

- *Petition of Advocates for Prattsburgh, Cohocton Wind Watch and Concerned Citizens of Italy for a Declaratory Ruling on Windfarm Prattsburgh* (Case No. 07-E-0674)
  - PSC applied definitions of Public Service Law §2 (PSL).
  - Essentially, whether a particular wind project qualifies as an electric corporation subject to regulation under the PSL requires a case-by-case analysis of the megawatt (mW) capacity of the project as well as the physical proximity of the project's facilities to one another and to end users.

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Treatment of Wind Energy Projects as Public Utilities

- No PSC jurisdiction over the WFP project because:
  - WFP project has 66 mW nameplate capacity, short of the 80 mW threshold established in PSL § 2(2-b).
    - PSC did not aggregate the output capacity of nearby affiliated wind energy projects because those projects would not be interconnected with the WFP project.
  - WFP project considered same "site" despite that the related facilities would be constructed on a variety of parcels in which the developer had acquired a variety of property interests.
    - Critical factor: developer's site control of the various parcels.

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Treatment of Wind Energy Projects as Public Utilities

- "Logistic problems[,]" need for constant supply, and lack of alternative sources for customers/ alternative means of delivery by suppliers.
  - The electricity generated by wind turbines is sold to the electric grid and then distributed by the New York Independent System Operator to customers.
  - Unlike cell phone and cable companies, wind turbines do not provide services to end-users.

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Treatment of Wind Energy Projects as Public Utilities

- Wind energy projects may not satisfy the definition of "public utility" in many municipal zoning codes.
  - ZBA decisions interpreting local codes are entitled to customary deference.
    - *Wind Power Ethics Group v. Zoning Board of Appeals of Town of Cape Vincent,* 60 A.D.3d 1282, 875 N.Y.S.2d 359 (4th Dept. March 20, 2009) (upholding ZBA's determination that wind energy project qualified as public utility under local code).
    - *West Beekmantown Neighborhood Association, Inc. v. Zoning Board of Appeals of the Town of Beekmantown,* 53 A.D.3d 954, 861 N.Y.S.2d 864 (3d Dept. 2008) (same).

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Treatment of Wind Energy Projects as Public Utilities

- Public utility status does not equal total freedom from local regulation.
  - Prohibition on exclusion "has never meant that a utility may place a facility wherever it chooses within the community."
  - "Relaxed" standard requires applicant to show:
    - new construction "is a public necessity in that it is required to render safe and adequate service"; and
    - "there are compelling reasons, economic or otherwise, which make it more feasible" to build a new facility than to use "alternative sources of power such as may be provided by other facilities."
  - If no such necessity is shown, the local zoning agency could deny the application for a variance or special use permit.

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Traditional Zoning and Police Powers

- There is no mandate preempting local regulation of wind energy projects, thus traditional zoning and police powers apply.
  - If not a public utility, the traditional unnecessary hardship standard for a use variance applies. Town Law § 267-b.
  - Municipalities must comply with SEQRA when reviewing an application for approval of a specific wind energy project or considering amendments to the local zoning law to address such projects.
  - Relevant considerations include: preservation of community character and aesthetic value, diminution of noise, traffic, and other environmental impacts, adherence to a comprehensive plan, and promotion of other general public health and safety concerns. Town Law §§ 261, 263, & 267-b.

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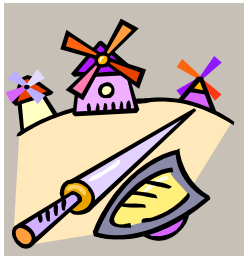

Ensuring Benefits Outweigh Burdens

- Host Community Agreements
  - Historically used as a tool to mitigate the impacts of a proposed development on the community.
  - Wind energy development is no exception.

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Ensuring Benefits Outweigh Burdens

- Typical provisions of HCAs in the wind energy context:
  - Schedule of fixed payments to municipality based on nameplate capacity; to be made over time.
  - On-going operation concerns (complaint resolution procedures and specific protocols and funding for noise compliance testing, etc.).
  - Road use (preparation, maintenance, restoration)
  - Decommissioning at project termination.

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Ensuring Benefits Outweigh Burdens

- Legal Authority for HCAs
  - New York Real Property Tax Law § 487
    - RPTL § 487(2) – wind facility 15 year property tax exemption
    - RPTL § 487(8) – a local taxing jurisdiction may "opt out" of this tax exemption by resolution *OR*
    - RPTL § 487(9) – local taxing jurisdiction may enter into payment in lieu of tax (PILOT) agreement with the developer.

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Ensuring Benefits Outweigh Burdens

- Legal Authority for HCAs (cont'd)
  - Potential conflict with IDA PILOT agreement with developer:
    - IDA financial assistance under General Municipal Law § 874(1) usually results in PILOT Agreement pursuant to GML § 858(15) to compensate affected tax jurisdictions for lost real property tax revenue.
    - Section 858(15) mandates that payments in lieu of taxes be allocated proportionally to ALL affected tax jurisdictions unless ALL affected tax jurisdictions consent to different allocation.
    - Affected tax jurisdictions include all municipalities and school districts in whose taxing jurisdiction the project will be built and operated.
    - HCA payments subject to IDA PILOT allocation?

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Ensuring Benefits Outweigh Burdens

- Legal Authority for HCAs (cont'd)
  - Traditional zoning powers conferred by Town Law.
  - Measures pursuant to SEQRA to minimize environmental impacts.
  - Home rule powers granted in Article IX of the New York State Constitution and Municipal Home Rule Law § 10, specifically control over municipal roadways.

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Ensuring Benefits Outweigh Burdens

- Incentive zoning is also an appropriate tool to offset community impacts.
  - *Fingerlakes Preservation Association v. Town Board, Town of Italy, et al.,* Yates County Supreme Court Index No. 2009-237 (October 8, 2009) (Falvey, Acting J.S.C.).
- Town adopted local law rezoning two areas as Wind Energy Incentive Zones.
- Town also adopted noise mitigation standards and minimum setbacks.

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Ensuring Benefits outweigh burdens

Incentive Zoning (cont'd)

- Among other things, petitioner challenged the local law on the grounds that the Town did not sufficiently mitigate environmental impacts.
  - Claimed that SEQRA does not allow use of "incentives" to offset impacts.

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Ensuring Benefits Outweigh Burdens

Incentive Zoning (cont'd)

- Court held that it was acceptable to use incentive zoning in conjunction with mitigation measures pursuant to SEQRA.
- The record established that the Town had "educated itself on the ramifications of the proposed legislation; considered different courses of action; and chose the course of action which it determined balanced the existing and potential social, economic and environmental factors."

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Conclusion

- This area is constantly evolving; keep up to date.
- Guiding principle: municipality must take actions and make decisions consistent with its zoning powers and obligations to ensure that the benefits outweigh the burden on the community.

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The End