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Host Community Agreements for Wind Farm
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*Daniel A. Spitzer, Patricia E. Salkin
and Michael Bookser*

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HOST COMMUNITY AGREEMENTS FOR WIND FARM DEVELOPMENT

**Daniel A. Spitzer, Patricia E. Salkin
and Michael Bookser¹**

Balance. No word better describes the goal of communities dealing with development proposals as they weigh competing benefits and impacts, financial and environmental. And few developments have challenged communities' quest to find the right balance as have utility-scale wind energy projects.² One tool some communities are employing to achieve balance is a Host Community Agreement (HCA). An HCA is defined as a contract between a developer and the local governing body or bodies of the host community, whereby the developer agrees to provide the community with certain benefits and mitigate specified impacts of the project.³ While the media focus, and much of the public discussion, has been on the financial benefits HCAs can generate, they can also be important tools in the environmental arena, by providing protocols for noise testing over the life of a project, insuring that local roads are properly remediated from the effects of the wind farm construction, and securing the funding for decommissioning that may not occur for decades.

Because of the varied role they play, HCAs rely on a variety of municipal powers for their legality. This article examines the role of the HCAs in wind farm developments, and their basis in New York law, in particular the legal basis for the financial benefits paid to local communities.

Introduction

Bolstered by the strongest wind resources east of the Mississippi and supportive state policies, New York has become the 9th largest producer of wind energy in the country.⁴ Recently there has been a proliferation of wind energy projects across New York State,⁵ and by the end of 2008 a total of 832 megawatts of installed wind power were in existence in New York.⁶ Seven more wind power projects were under construction in 2008.⁷

Although wind farms are praised as a source of renewable energy, they nevertheless present a number of environmental challenges.⁸ While it is not our intent to enter the siting controversies involving wind facility placement, recognition of the environmental concerns is important because of the role HCAs can play in mitigation of alleged harms.

There are arguments that wind farms have negative impacts on wildlife such as bird and bat populations,⁹ as well as bears,¹⁰ although these impacts have been disputed due to a lack of research on these populations around wind farms.¹¹ Wind turbine noise disturbs some residents, while other residents assert that the wind farms destroy scenic views.¹² In addition, turbine farms have been blamed for reducing tourism; in one claim, snowmobilers do not go to one area anymore because of the potential of ice throw from the wind mill rotors in the winter months.¹³ Finally, when the sun is low in the sky at dawn and dusk, the turbine blades can produce a shadow flicker effect that may be another concern for local residents with property in the path of the shadow.¹⁴

As the wind industry has matured in New York, litigation has settled one key inquiry about its legal status, whether wind power was entitled to the same relaxed standard of zoning review accorded public utilities.¹⁵ The Third Department has now determined that such facilities are public utilities for zoning purposes.¹⁶ According to the Court, although “public utility” was “not defined by the zoning law at issue, it is undisputed that the wind turbines . . . will generate energy, a useful public service, and will be subjected to regulation and supervision by the Public Service Commission.”

The Third Department’s determination is relevant to our inquiry because the classification of wind farms as public utilities makes it harder to ban such facili-

ties. Thus, the importance of the HCA as a tool to balance the impacts of wind farms is increased.

Host Community Agreements

HCAs are a common land use tool used in many sectors from housing to landfills and more recently in connection with wind farm projects. The general theory of an HCA is that a community will incur some negative impacts from large scale projects for which the community as a whole, as opposed to just the private property owners involved in the project, should receive benefits. HCAs are intended to mitigate the unavoidable adverse impacts that certain types of developments can impose on communities.

The most common element of an HCA is some form of payment, usually tied in some manner to the impact on the community. Thus it is common for landfill HCAs to include host payments based on the volume of waste deposited.¹⁷ For wind farms, usually the payments are based on the maximum megawatt (MW) output of each wind turbine installed in the municipality.¹⁸ The actual output of any individual wind turbine is dependent on the wind capacity factor, which is the percentage of the total possible capacity of a specific turbine at a location. Because the wind speed is variable and the actual capacity factor is considered proprietary information by the wind companies, the maximum rated capacity is usually used. This also helps the recipient community because the amount of payment is fixed.

The second most common factor is some form of road use agreement. Wind farm construction is often the largest construction project a host community has experienced. Mainly with town roads, but also to an extent with county roads, some roadways can simply not handle the heavy construction traffic.¹⁹ Wind turbine blades and tower sections are brought into a site in sections about 80 feet in length. The necessary turning radius for these vehicles may require widening of intersections. Concrete and other material trucks, along with construction cranes, present extremely heavy loads. In many rural areas favored by these projects, the farm or forest roads were never engineered or constructed to any standards. Roadways, culverts, and even bridges may have to be replaced before construction begins as they cannot support the loads. Even after construction, necessary maintenance vehicles, and,

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at project end, vehicles engaged in decommissioning, present continued impacts.

HCA's address these concerns with agreements for remediation and reconstruction as necessary. A typical road use HCA will have, in addition to providing payment for a town-retained road expert, several components:

1. **Pre-Construction Improvements.** The wind company identifies and upgrades roads, culverts, intersections, or bridges as necessary.
2. **Pre-Construction Post-Improvement Road Survey.** A survey is made by wind company and municipal engineers, usually by video, cataloging the condition of the roadways before construction. This survey is used to set a bond amount that the wind company must post to cover the cost of anticipated post-construction remediation. The host community gains a benefit if the HCA requires post-construction remediation to restore roads to this pre-construction status, rather than the pre-improvement status.
3. **Construction Phase.** During the construction phase it is vital that roads remain open in a safe condition, and repairs be made on an on-going basis of potholes and other safety threats. A properly drawn HCA provides for an independent monitor through out construction, paid for by the wind company.
4. **Post-Construction Remediation.** This phase entails restoring the roads to their prior condition; in effect, to erase the impacts of the project. A key point here for communities is to be sure of the level of reconstruction it wants. A project that converts miles of dirt roads to miles of paved roads leaves a town with significant future expenses for maintaining the now paved roads.

Other HCA provisions address on-going operation concerns. An HCA may provide for a Complaint Resolution Process, including the use of a complaint line staffed 24/7, specific time lines for responses, and possible use of mediation to resolve disputes. Another issue that can be addressed is establishing protocols and funding for noise compliance testing.

Finally, most HCA's address the difficult issue of decommissioning the wind turbines at the end of a project. Municipalities normally do not regulate the removal of facilities at the end of their useful lives, but the specter of fields of abandoned wind turbines dotting the future landscape makes the responsibility for and funding of decommissioning essential concerns at the application stage.²⁰ Most communities are not experienced in planning past the next budget or at most, five-year capital plans. Wind turbine decommissioning

requires finding the means to enforce end-of-life removal requirements while factoring in possible transfer of ownership, the rights of creditors, and even bankruptcy considerations. The plan must also establish a funding source that will provide adequate future funding for the community to remove towers if the owners does not, including the methodology for updating removal cost estimates over the life of the project. HCA's are ideal vehicles to address these complex requirements.

Legal Basis for HCAs

Authority for host community agreements varies from state to state. Both Maine and Rhode Island, for example, have a statutory basis for HCAs, specifically for waste facilities.²¹ Because there is no specific New York statutory authority allowing towns to enter into HCAs, some critics have challenged their validity.²² But in fact, a wide range of authority exists in New York law, not only in the exercise of the police powers delegated by the Legislature, but also in a town's proprietary powers over the use of town-owned property. They have been long used by municipalities, and even state agencies and public authorities, specifically in the power generation field.²³ Contractual arrangements enforcing project conditions and State Environmental Quality Review Act mitigation requirements are standard operating procedure,²⁴ and especially appropriate for projects of the scale of wind farms. The specific authority for an HCA provision may differ depending on the purpose of the provision, thus the power to require decommissioning may rest on different footing than the receipt of financial benefits. But as a tool, HCAs have been upheld by at least one appellate court²⁵ and they represent a valid method of addressing wind farm issues.

What HCAs Are Not Contract Zoning

Perhaps understanding what communities cannot do with HCAs will best demonstrate why a properly drafted agreement stands on valid grounds. The primary danger is characterization of the HCA as so-called "contract zoning." Defining the parameters of the illegal action is not easy, for as the Court of Appeals has stated "[e]xactly what 'contract zoning' means is unclear and there is really no New York law on the subject. All legislation 'by contract' is invalid in the sense that a Legislature cannot bargain away or sell its powers."²⁶ Thus, an "agreement entered into between the parties, whereby the plaintiff, in exchange for a predetermined sum of money, would provide to defendant an expedited and favorable determination . . . is void as violative of public policy and is unenforceable."²⁷ The infraction arises because the "City had a duty to render its determinations . . . expeditiously . . .

[and the] law should not be applied more favorably to the highest bidder or based on whether or not a party is able to pay.”²⁸

The main problem in characterizing HCAs as either a proper exercise of municipal powers or a forbidden journey into the realm of contract zoning is that HCAs are all unique, and gross classifications will not suffice; as the Court of Appeals noted, “we deal here with actualities, not phrases.”²⁹ While the general terms of most HCAs are similar, there are differences, and there seems to be a divide between those HCAs where payments and affirmative obligations are meant to mitigate impacts versus those where payments are just meant for good faith dealings. For example, the purpose cited in the Prattsburgh HCA is that the payments are in exchange for the town to use its best efforts with any documents or permits that must be executed by the municipality.³⁰ The HCA specifically states “In exchange for the . . . host payments under [the] Agreement, the town shall use its best efforts to cooperate with the company with any permit applications . . . or documents required.” Moreover, the clause further establishes that the agreement is only to act in good faith when it states that the payments are specifically “not intended to be payment for [the] permits or cooperation.”

By contrast, the purpose of the HCA in the Town of Wethersfield intends to compensate the Town for the impacts the project will have on the area.³¹ The HCA expressly states that “this agreement is to be executed to compensate the Town for the use of its roads and for the impacts the Project will have on the Town, and to provide a mechanism to enforce and finance the mitigation conditions.”³² The HCA continues to make clear in another section that the agreement does not “provide any basis for approval of the facility.”³³

Contract zoning does not exist where “no provision in the agreement obligated the Town to issue such approvals.”³⁴ This opinion seems to bar HCAs that are bargains for special treatment from the municipality towards the company in exchange for HCA payments. Requirements like this in HCAs begin to blur the line between valid agreements and contract zoning, and may pose a problem for communities and companies who decide to insert them into HCAs they enter. But, absent a prohibited journey into the realm of legislative sales, contract zoning would not be applicable to HCAs.

Impact Fees and Developer Agreements

HCAs should be not be confused with impact fees and related developer agreements. Impact fees, statutorily authorized in more than half of the states, but not in New York (except for parks and recreation impacts) are fees assessed on developers for off-site im-

provements necessitated as a result of the proposed project.

Only about a quarter of the states authorize developer agreements (and New York is not one of them), which are essentially an agreement to extend vested rights to build out a project over a period of years, sometimes up to 10 years, in exchange for a payment to the municipality.³⁵ HCAs cannot obligate municipalities to grant vested rights to the project applicant; doing so is an ultra vires limit on future use of the legislative power.

Authority for HCAs

Real Property Tax Law

Critics will no doubt suggest that even if HCAs are not illegal contract zoning, they still need affirmative powers supporting their legality. But asserting that HCAs lack legal viability for lack of a direct statutory authority seems to understate the powers of municipalities. The Court of Appeals rejected a similar attack on conditional rezoning, leveled on the grounds that:

State enabling legislation does not confer on local authorities authorization to enact conditional zoning amendments. On this view any such ordinance would be ultra vires. While it is accurate to say there exists no explicit authorization that a legislative body may attach conditions to zoning amendments, neither is there any language which expressly forbids a local legislature to do so. Statutory silence is not necessarily a denial of the authority to engage in such a practice. Where in the face of nonaddress in the enabling legislation there exists independent justification for the practice as an appropriate exercise of municipal power, that power will be implied.³⁶

While it is true municipalities only possess the powers granted them by the State Legislature,³⁷ those powers are: (1) the specific powers granted; (2) those powers necessary to carry out the affirmative powers; and (3) those powers implicit in the first two grants of power.³⁸ Thus, the Court of Appeals has ruled where the legislature has directly granted power to regulate streets, a system of permits and inspections is necessary to carry out those duties, and the power to charge permit fees is implicit as a means to fund the regulatory system.³⁹ Examined in the context of these three levels of authority, it is respectfully argued that HCAs rest on solid legal authority.

For starters, there are in fact direct statutory authorizations for the financial benefits provided by HCAs, even without reference to compensating for community impacts. First is N.Y. Real Prop. Tax Law (McKinney’s RPTL) § 487, which exempts wind facilities from real property taxation for 15 years. But McKinney’s RPTL

§ 487 has a specific provision allowing local taxing jurisdictions to “opt out” of the tax exemption, and to enter into PILOT agreements with developers. HCAs containing annual payment requirements are, in part, directly compensating the community for the loss of tax revenues in a manner provided by law, specifically McKinney’s RPTL § 487. While many wind farm developers seek assistance from Industrial Development Agencies (IDA), including real property tax exemptions, nothing in McKinney’s RPTL § 487 limits its use where an IDA is also involved. HCA payments are made in addition to PILOT payments that may have been negotiated with the IDA.⁴⁰ NYSERDA supports this interpretation, recommending that local governments use the opt out provision as “leverage to negotiate a voluntary payment with the developers.”⁴¹

Where municipalities can run afoul of state law and lose the financial benefits of wind farms (or similar projects) is if they attempt to use zoning or licensing powers to create a de facto tax. Under New York law, license or permit fees can only recover the reasonably expected costs of regulation.⁴² Where the true purpose of a license fee is “to fill the . . . treasury from the annual payments,” the fee will be struck down.⁴³ Only the State Legislature possesses the taxing power; municipalities cannot expand their police power to co-opt that authority.⁴⁴ Wind regulatory laws assessing per megawatt fees intended as general fund receipts are unlikely to withstand legal challenge. Thus there is a need for HCAs or PILOTs of some form, if a municipality is obtain significant financial benefits.⁴⁵

Planning and Zoning Enabling Acts

For those communities who have enacted zoning ordinances, the state enabling statutes provide the primary authority for HCAs, including certain financial aspects. Many communities regulate the placement of wind turbines by requiring creation of wind overlay zones as well as establishing detailed site design and special permit criteria. Direct legislative authority exists for placing conditions on special use permits, site plans, and variances to protect the public health, safety, and welfare.⁴⁶ Zoning conditions will be upheld as long as they relate to the use of the land, and are reasonable and otherwise constitutional.⁴⁷ While conditions are usually thought of in the form of limitations, courts have upheld conditions and implementing agreements creating affirmative obligations, for example upholding a promise contained in an affirmative covenant to restore trees and re-grade the surface consistent with the surrounding terrain.⁴⁸ It is difficult to see a difference between the de-commissioning requirements of an HCA and this court-approved promise of restoration supported by an enforceable covenant between the parties. The Court of Appeals

has also upheld an affirmative obligation for owners of one property to make payments over a period of time for the benefit of all properties in a development, even though the money was to be expended for “public purposes” for “roads, beaches, public parks or spaces and improvements in the same tract.”⁴⁹ HCAs serve the same purpose, benefitting the entire community by providing funds for public expenditures related to the land use, including funds for road repair, noise testing, and decommissioning.

Within the zoning enabling statute is another direct authorization through the use of incentive zoning.⁵⁰ Incentive zoning enables communities to identify needed and desired community benefits and amenities, and then to adjust provisions in the zoning district where a proposed project is to be sited in exchange for specific physical, social or culture benefits that would inure to the community. Further, the statute allows the local legislative body to require a payment in lieu of providing specific amenities where the legislature determines that suitable benefits or amenities are not immediately feasible or otherwise practical.⁵¹ Where communities opt-in to the incentive zoning process, many of the public infrastructure improvements contained in HCAs fit squarely into the statutory scheme.

Before leaving the sphere of zoning, it is important to remember that the fundamental rule of zoning is that it is to be conducted in a comprehensive manner for the benefit of all, rather than the few. By spreading the benefits across the community through payments to a local government while limiting the harms imposed by the developers, HCAs further the goal of comprehensive zoning.

State Environmental Quality Review Act

The next source of power supporting HCAs is the State Environmental Quality Review Act (SEQRA),⁵² which is especially important for those rural communities that do not have zoning.⁵³ SEQRA requires that agencies, including municipalities “to the maximum extent practicable, minimize or avoid adverse environmental effects” of actions they take or approve.⁵⁴ HCAs provide an excellent vehicle for enforcing and financing required mitigation measures.

SEQRA provides authority to regulate conduct after approvals. Thus, the Court of Appeals upheld a negative declaration conditioned on an applicant being required to remediate any damage caused by further beachfront erosion.⁵⁵ HCAs provide a contractual enforcement mechanism for such conditions. HCAs can be used to limit future environmental impacts. For example, HCAs have been used in the landfill industry to regulate the annual and quarterly tonnage receipts a landfill can receive, which directly controls the amount of truck traffic a facility generates.⁵⁶

SEQRA provides legal support for contractual arrangements whereby applicants commit financial resources to mitigate potential harms.⁵⁷ Common in wind projects are financial payments, known as offsets, to improve buildings or other resources of historical significance, in recognition of the unavoidable adverse visual impact wind farms can have on these resources.⁵⁸ SEQRA also supports decommissioning requirements to minimize long-term impacts.⁵⁹

Proprietary Powers

All of the powers addressed so far are derived from a municipality's governmental or police powers. But municipalities also have proprietary powers relevant to wind farms. Another source of authority is the municipal right, found in the State Constitution and related statutes, to control its property, including its roads.⁶⁰ For HCAs, this justifies (along with SEQRA mitigation mandates) the requirement of road restoration, and posting of a bond. HCAs can limit travel routes and require roadways be maintained in a safe condition throughout construction. Indeed, it would be a derelict governing board that allowed such impacts to its roadways without a bond and similar guarantees of road restoration.

But, as to roads, it should also be remembered that wind farms are a form of electric utility. Every other utility - electric, telephone, or cable - pays the community a franchise fee for use of its rights-of-way.⁶¹ Why should wind farms, which string their collection systems along, under, and across public roads be any different? Where its roads are concerned, towns are acting as property owners, and, in this proprietary capacity, have a right to strike whatever rental deal the private and public parties decide is fair compensation for the use of the roadways. Such income represents, like RPTL § 487 authorized payments, more than recompense for impacts, rather a form of income payable to the benefit of the whole community.

Ethical Considerations

Some of the criticism lodged against the use of HCAs is that wind farm developers may use this tool to "buy" their way into municipalities strapped for cash and that local elected officials will in essence "sell out the town" for projects that may not be desired by residents. It is important to distinguish this argument from the unfortunate ethical allegations that have recently surrounded wind farm development in Upstate New York.⁶² Those allegations arise from situations involving alleged conflicts of interest on the part of municipal officials resulting in personal financial gains that could inure to them as a result of consideration of wind farm applications and proposals.⁶³ The situation presented by HCAs, however, is different, as the

municipal officials are not acting out of personal self interest; rather, following well considered plans and identified community needs and amenities, the local legislative body is seeking to negotiate a balanced and fair deal to not only mitigate traditional environmental impacts but to obtain statutorily authorized payments to help cover the costs associated with hosting a wind energy project.

Conclusion

Municipalities have long used agreements with developers to enforce both restrictive and affirmative obligations. HCAs are the latest in a long line of such agreements, with a legal foundation firmly rooted in New York law, with authority to recover for specific impacts as well as for the benefit of the whole community. Unless they represent an improper bargaining away of a legislative body's rights, the HCA should withstand.

NOTES

1. Daniel A. Spitzer is a partner with Hodgson Russ, LLP in Buffalo, NY; Patricia E. Salkin is the Raymond and Ella Smith Distinguished Professor of Law, Associate Dean and Director of the Government Law Center of Albany Law School. Michael Bookser is a second year student at Albany Law School.
2. This Article deals solely with large scale wind projects designed to generate power for sale to the market, and not residential or agricultural wind energy generators, which are intended mainly to meet the electric needs of the host property.
3. A HCA should not be confused with a Community Benefit Agreement (CBA), which "is a legally enforceable contract negotiated and executed directly between the developer and a community coalition of neighborhood associations, faith-based organizations, unions, environmental groups, and others representing the interests of people who will be impacted by proposed new developments." David A. Marcello, *Community Benefit Agreements: New Vehicle for Investment in America's Neighborhoods*, 39 Urb. Law. 657, 657-8 (2007). By contrast, HCAs are contracts between the developer and governmental agencies, but if an approving agency is a party to the CBA, or if a CBA is required as part of the approval process, it could be subject to the same legal scrutiny as HCAs. For more on CBAs, see Amy Lavine, *Community Benefits Agreement Blog*, <http://communitybenefits.blogspot.com/>.
4. American Wind Energy Association, U.S. Wind Energy Projects – New York, <http://www.awea.org/projects/projects.aspx?s=New+York> (rank is for existing capacity; for potential capacity, New York ranks 15th in the nation).
5. See, e.g., Todd M. Mathes, *New York Wind Power Case Law Update*, 8 No. 4 New York Zoning Law & Prac. Rep. 1 (2008).
6. American Wind Energy Association, U.S. Wind Energy Projects – New York, <http://www.awea.org/projects/projects.aspx?s=New+York>.

7. American Wind Energy Association, Market Report 2007, http://www.awea.org/market_report_jan08.pdf, and 2008 First Quarter Market Report, <http://www.awea.org/publications/reports/1Q-Market-Report-2008.pdf>.
8. See generally, Michael Donohue, *Siting of Wind Power Developments*, 28 No. 4 Zoning & Plan. Law Rep. (ZPLR) 1 (April 2005).
9. See, e.g., Nancy Madsen, *Wind project held up by bats*, The Watertown Daily Times, June 7, 2008, available at <http://www.watertowndailytimes.com/article/20080607/NEWS03/102092422>; NYSERDA, Power ... Naturally, Investing in a Cleaner NY, Birds and Bats: Potential Impacts and Survey Techniques, http://www.powernaturally.org/Programs/Wind/toolkit/4_birdsbatsrevised.pdf.
10. http://www.vpr.net/news_detail/82053/; <http://www.rutlandherald.com/apps/pbcs.dll/article?AID=/20081107/NEWS02/811070357/0/FRONTPAGE>; <http://www.windaction.org/news/17934>.
11. See, e.g., Wind Watch, FAQ – Impact on Wildlife, <http://www.wind-watch.org/faq-wildlife-p.php>.
12. See, e.g., NYSERDA, Power ... Naturally, Investing in a Cleaner NY, Other Potential Environmental Impacts, http://www.powernaturally.org/Programs/Wind/toolkit/5_otherpotenviroimpactsrevised.pdf.
13. Jim Pfiffer, *Can Windmills attract travelers? Some say yes, others no*, The Star Gazette (Elmira), Aug. 31, 2007, available at <http://www.wind-watch.org/news/2007/08/31/can-windmills-attract-travelers-some-say-yes-others-no/>.
14. John Methia, *Life in a 'shadow flicker' home*, South Coast Today, May 26, 2007, <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20070526/OPINION/705260312>.
15. Patricia E. Salkin and Robert Burgdorf, *Siting wind farms in New York: Applicability of the relaxed public utility standard*, 7 No. 1 New York Zoning Law and Prac. Rep. 1 (2006).
16. In the Matter of 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).
17. Landfill HCAs often include free sanitation service for residents in addition to payments. See, e.g., Ralph Schwarz, *Niagara Town Board passes host community agreement with BFI, Transfer of sanitation service to benefit Niagara taxpayers*, Niagara Wheatfield Tribune, Nov. 24, 2005, available at http://www.wnypapers.com/news/2005/11/t24_ton.htm.
18. See e.g., HCA between Canandaigua Power Partners, LLC, and the Town of Cohocton, NY, §3, (herein "Cohocton HCA"), available at <http://www.cohoctonfree.com/UPC/HostAgreement082407.pdf>.
19. See generally NYSERDA, Power ... Naturally, Investing in a Cleaner NY, Other Potential Environmental Impacts at 17-18, http://www.powernaturally.org/Programs/Wind/toolkit/5_otherpotenviroimpactsrevised.pdf; Power ... Naturally, Investing in a Cleaner NY, Agricultural Impacts Resulting from Wind Farm Construction, http://www.powernaturally.org/Programs/Wind/toolkit/7_visualimpactupfront.pdf.
20. Telecommunication towers are another highly visible use on which communities often impose decommissioning responsibilities.
21. Me. Rev. Stat. Ann. tit. 38, § 2170-A; R.I. Gen. Laws § 23-19-13.4.
22. See e.g., Nancy Madsen, *Wind counsel prefers PI-LOT; Host-community deals are risky, McAuliffe says*, Watertown Daily Times, Feb. 6, 2008, available at <http://watertowndailytimes.com/article/20080206/NEWS03/829612503>.
23. The New York Power Authority (NYPA) recently entered into HCAs as part of its Massena and Lewiston plant relicensing efforts. See Louis P. Ciminelli, Chairman of the New York Power Authority, Remarks at an event marking presentation of the first payment to local communities under an agreement on relicensing of NYPA's St. Lawrence-Franklin D. Roosevelt Power Project in Massena, Lisbon, New York (May 22, 2002), available at <http://www.nypa.gov/press/speeches/2002/20522a.htm>. In its auction of renewable energy credits, the New York State Energy Research and Development Authority (NYSERDA) rewards companies making host community payments with a higher score. Renewable Portfolio Standard Program Purchase of Renewable Energy Attributes Request for Proposals (RFP) No. 1168, available at <http://www.nyserda.org/Funding/1168rfp.pdf>.
24. See *Smith v. Town of Mendon*, 4 N.Y.3d 1, 789 N.Y.S.2d 696, 822 N.E.2d 1214, 59 Env't. Rep. Cas. (BNA) 2133, 35 Env'tl. L. Rep. 20001 (2004); *Church v. Town of Islip*, 8 N.Y.2d 254, 203 N.Y.S.2d 866, 168 N.E.2d 680 (1960) (using restrictive covenants to enforce zoning conditions is not illegal contract zoning).
25. *Concerned Citizens of Cattaraugus County, Inc. v. Town Bd. of Town of Farmersville*, 221 A.D.2d 1010, 634 N.Y.S.2d 280 (4th Dep't 1995), *lv. to app. denied*, 87 N.Y.2d 809, 642 N.Y.S.2d 858, 665 N.E.2d 660 (1996).
26. *Church*, 8 N.Y.2d at 259.
27. *City of New York v. 17 Vista Associates*, 84 N.Y.2d 299, 306, 618 N.Y.S.2d 249, 252, 642 N.E.2d 606, 609 (1994).
28. *17 Vista*, 84 N.Y.2d at 299.
29. *Church*, 8 N.Y.2d at 259.
30. Host Community Agreement Between Windfarm Prattsburgh, LLC and Town of Prattsburgh (11/19/2007) (on-file with the authors).
31. Host Community Agreement between Town of Wethersfield and Noble Wethersfield Windpark, LLC (unexecuted copy on file with the authors).
32. Wethersfield HCA at 2.
33. Wethersfield HCA at 5.
34. *De Paolo v. Town of Ithaca*, 258 A.D.2d 68, 71, 694 N.Y.S.2d 235, 238-9, 137 Ed. Law Rep. 343 (3d Dep't 1999).
35. See generally, Salkin, *American Law of Zoning* (AM-ZONING) § 32:13 (5th ed.); and Callies and Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 Case W. Res. L. Rev. (CWRLR) 663, n.32 (2001).
36. *Collard v. Incorporated Village of Flower Hill*, 52 N.Y.2d 594, 602, 439 N.Y.S.2d 326, 421 N.E.2d 818 (1981) (citations omitted).

37. *Seaman v. Fedourich*, 16 N.Y.2d 94, 101, 262 N.Y.S.2d 444, 449, 209 N.E.2d 778 (1965).
38. *Deady v. Village of Lyons*, 39 A.D. 139, 140, 57 N.Y.S. 448 (4th Dep't 1899) (quoting Dillon, Mun. Corp. § 89 (4th ed.)).
39. *City of Buffalo v. Stevenson*, 207 N.Y. 258, 260-63 (1913).
40. It has been suggested that IDA Payment-in-lieu-of-Taxes (PILOT) payments are preferable to HCAs because PILOTs have a statutory basis while HCAs do not (see Madsen, *supra* note 21), but there is no basis for including road use agreements, decommissioning or other important parts of an HCA. Additionally, as discussed below, unless involved taxing jurisdictions agree, PILOT payments must be split up on the basis of current tax rates, and this split may not be acceptable to all host communities.
41. NYS Energy Research & Development Authority, Property Tax: Exemptions and PILOT (Payments-in-lieu-of-Taxes) at 5, http://www.powernaturally.org/Programs/Wind/toolkit/19_propertytaxexemptions.pdf.
42. *Jewish Reconstructionist Synagogue of North Shore, Inc. v. Incorporated Village of Roslyn Harbor*, 40 N.Y.2d 158, 386 N.Y.S.2d 198, 352 N.E.2d 115 (1976).
43. *City of Buffalo v. Stevenson*, 207 N.Y. 258, 263, 100 N.E. 798 (1913) (citing *City of New York v. Second Ave. R. Co.*, 32 N.Y. 261, 274, 1865 WL 3959 (1865)).
44. *Castle Oil Corp. v. City of New York*, 89 N.Y.2d 334, 338, 653 N.Y.S.2d 86, 675 N.E.2d 840 (1996).
45. As discussed *infra*, some communities have also relied on incentive zoning laws (see, e.g., N.Y. Town Law § 261-b) to provide benefits over and above the cost of regulation. See *Town of Leicester Amended Zoning Ordinance*, at <http://www.gfllrpc.org/programareas/wind/LL/TofLeicesterAmendedZoningOrdinance.pdf>.
46. N.Y. Town Law §§ 274-a, 274-b, 267-a.
47. *St. Onge v. Donovan*, 71 N.Y.2d 507, 527 N.Y.S.2d 721, 522 N.E.2d 1019 (1988).
48. *City of New York v. Delafield 246 Corp.*, 236 A.D.2d 11, 662 N.Y.S.2d 286 (1st Dep't 1997), order resettled, 244 A.D.2d 272, 668 N.Y.S.2d 89 (1st Dep't 1997), *app. denied*, 91 N.Y.2d 811, 671 N.Y.S.2d 715 (1998).
49. *Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav. Bank*, 278 N.Y. 248, 259-260, 15 N.E.2d 793, 118 A.L.R. 973 (1938).
50. N.Y. Town Law § 261-b; N.Y. Village Law § 7-703(1)(c); N.Y. Gen. City Law § 81-d. See also Richard Kern, *Incentive Zoning Provides Opportunities for Community Amenities*, 7 No. 8 New York Zoning Law and Prac. Rep. (May/June 2007).
51. See, e.g., N.Y. Town Law § 261-b(3)(h) (where this option is exercised, the local legislative body is required to deposit the funds into a specially designated trust fund to be used exclusively for the benefits authorized by the local legislative body).
52. N.Y. Envtl. Conserv. Law Art. 8.
53. To the extent these communities rely on police powers other than those granted by the zoning enabling statute to regulate land uses, the same right to impose reasonable conditions exists.
54. N.Y. Envtl. Conserv. Law § 8-109(1).
55. *Gordon v. Rush*, 100 N.Y.2d 236, 762 N.Y.S.2d 18, 23-24, 792 N.E.2d 168, 33 Envtl. L. Rep. 20216 (2003).
56. See Second Amended Host Community Agreement between the Town of Lewiston and Modern Landfill Inc, *available at* http://www.townoflewiston.us/pdf/2nd_host_agreement.pdf.
57. *Develop Don't Destroy (Brooklyn) v. Urban Development Corp.*, 2008 WL 206942 (N.Y. Sup 2008), *aff'd*, 2009 WL 465770 (N.Y. App. Div. 1st Dep't 2009) (mitigation included "an agreement with the New York City Department of Education (DOE) that upon DOE's request, the project sponsors would provide adequate space for the construction and operation of an approximately 100,000-square-foot elementary and intermediate school in the base of one of the Phase II residential buildings").
58. New York State Dept. of Environmental Conservation, DEC Policy, Assessing and Mitigating Visual Impacts, at 8-10, *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/visual2000.pdf.
59. New York State Dept. of Environmental Conservation, DEC Policy, Assessing and Mitigating Visual Impacts, at 9, *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/visual2000.pdf.
60. N.Y. Const. Art. IX, § 2(c)(6).
61. See, e.g., N.Y. Pub. Serv. Law § 99 (municipal franchise required for telegraph and telephone lines).
62. See Nicholas Confessore, *In Rural New York, Windmills Can Bring Whiff of Corruption*, *The New York Times*, Aug. 17, 2008, *available at* http://www.nytimes.com/2008/08/18/nyregion/18windmills.html?_r=2&hp.
63. See Patricia E. Salkin, *New Code of Ethics for Wind Energy Companies Doing Business in New York: A Back-Door Approach to Regulating Municipal Ethics?*, *The Municipal Lawyer* (NYSBA 2009).

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