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Renewable Energy And Land Use  
Regulation (Part 2)

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# Renewable Energy And Land Use Regulation (Part 2)

*Patricia E. Salkin*

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# Renewable Energy And Land Use Regulation (Part 2)

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Patricia E. Salkin



## Patricia E. Salkin

is the Raymond & Ella Smith Distinguished Professor of Law, Associate Dean and Director, Government Law Center, at Albany Law School. This paper largely comprises relevant excerpts from a series of recently published and forthcoming law review articles by the author in the *William & Mary Environmental Law and Policy Review* (“Sustainability and Land Use Planning: Greening State and Local Land Use Plans and Regulations to Address Climate Change Challenges and Preserve Resources for Future Generations”); the *Hofstra Law Review* (with Ostrow) (“Cooperative Federalism and Wind: A New Framework for Achieving Sustainability”); the *University of Houston Environmental & Energy Law & Policy Journal* (“Can You Hear Me Up There? Giving Voice to Local Communities Imperative for Achieving Sustainability”); and the *University of Colorado Law Review* (“New York Climate Change Report Card: Improvement Needed for More Effective Leadership and Overall Coordination with Local Government”). This paper was prepared for the August 2009 ALI-ABA annual Land Use Institute.

## G. Wind Energy

1. *Approaches To Regulating Siting Of Wind Projects*
  - a. In many wind-rich states, traditional local zoning and land use regulatory authorities, including county commissions, local planning and zoning boards, and local legislatures, are responsible for approving and siting wind farms and other energy facilities. See National Conference of State Legislatures, *State Siting and Permitting of Wind Energy Facilities* iii (Apr. 2006) (“NCSL State Siting”), available at [www.nationalwind.org/assets/publications/siting/Siting\\_Factsheets.pdf](http://www.nationalwind.org/assets/publications/siting/Siting_Factsheets.pdf). For example, in Iowa, local governments are charged with siting wind turbines. As a result, “siting guidelines and application procedures vary across the state.” Iowa Department of Natural Resources, *Wind Energy and Wildlife Resource Management in Iowa*:

Avoiding Potential Conflicts, at 2, [www.iowadnr.gov/wildlife/diversity/files/wind\\_wildliferecs.pdf](http://www.iowadnr.gov/wildlife/diversity/files/wind_wildliferecs.pdf) (“Iowa currently exercises minimal regulation on locating wind farms.”). Other states in which wind turbine siting is under the aegis of local governments include New York, Texas, Idaho, North Carolina, Utah, Nevada, and Illinois. The New York State Association of Towns 2009 Legislative Resolution calls on the governor, state legislature, and state agencies to “develop new laws and regulations that will preserve local authority over the siting of [wind farms.]” The towns believe that local governments have been successful in their efforts to implement wind siting ordinances in a manner responsive to residents, local businesses, environmentalists, and wind developers. New York State Association of Towns, 2009 Legislative Resolutions 4–5, available at [www.nytowns.org/core/contentmanager/uploads/2009%20Legislative%20Program.pdf](http://www.nytowns.org/core/contentmanager/uploads/2009%20Legislative%20Program.pdf). See *Texas Comptroller of Public Accounts, The Energy Report* 174 (2008), available at [www.window.state.tx.us/specialrpt/energy](http://www.window.state.tx.us/specialrpt/energy) (follow the “Chapter 11: Wind Energy” link) (“In Texas, there are no state guidelines for wind turbine siting. Counties can discourage but cannot prohibit power plant development. The Texas Parks and Wildlife Department will review a wind energy project against a draft set of guidelines for wildlife protection, if asked. The 2007 Texas Legislature considered a bill—HB 2794—that would have required a permitting process for wind energy projects, but it did not pass.”). See *U.S. Fish and Wildlife Service, Wind Power Siting Regulations and Wildlife Guidelines in the United States* 14 (2007) (“FWS Siting Regulations Report”), available at [www.batsandwind.org/pdf/afwastsitsum.pdf](http://www.batsandwind.org/pdf/afwastsitsum.pdf) (“Wind power [in Idaho] is currently unregulated at any level of government—local zoning may impact siting but this is variable”; “North Carolina Utilities Commission provides a certificate of public convenience and necessity for energy facilities greater than 300 MW. Small wind energy facilities are typically handled by County Planning Boards, specific consideration or ordinances relating to wind power are variable.”). In North Carolina, the Mountain Ridge Protection Act of 1993 provides that “. . . building, structure or unit shall protrude at its uppermost point above the crest of the ridge by more than 35 feet.” N.C. Gen. Stat. §113A-206 (3). Although windmills are exempt, the state Attorney General has indicated that the law would apply to a wind farm. *La Capra Associates, Inc. et al., Analysis of a Renewable Portfolio Standard for the State of North Carolina* 32 (prepared for the North Carolina Utilities Commission) (2006), available at [www.ncuc.commerce.state.nc.us/reps/NCRPSReport12-06.pdf](http://www.ncuc.commerce.state.nc.us/reps/NCRPSReport12-06.pdf). See also FWS Siting Regulations Report at 46 (“There is no single Utah State government agency with primary responsibility for electric generation plant siting. Public Service Commission of Utah, Utah Division of Public Utilities and many others are included in the list and it is the developer’s responsibility to contact each agency to determine the necessary requirements for the specific proposed project.”); *Id.* at 30 (“Public Utilities Commission of Nevada issues a permit for construction of electrical facilities, this includes renewable energy generating facilities greater than 150 KW.”); 2007 Laws, H.B. 620, Public Act 95-0203; 55 ILCS 5/5-12020; 65 ILCS 5/11-13-26. See also *Anderson’s American Law of Zoning* §37:9 (Patricia E. Salkin, ed., 5th ed. 2008) (“Counties and municipalities in Illinois may establish standards for wind farms and electric-generating wind devices, including the height of the devices and the number of devices that may be located within a geographic area. The county may regulate the siting of wind farms and electric-generating wind devices in unincorporated areas of the county outside of the zoning jurisdiction of a municipality and the 1.5-mile radius surrounding the zoning jurisdiction of a municipality. A municipality may

regulate wind farms and electric-generating wind devices within its zoning jurisdiction and within the 1.5 mile-radius surrounding its zoning jurisdiction.”).

- b. Several other states have developed voluntary guidelines or model ordinances for use by local governments. *See* NCSL State Siting. For example, in 2007, Wisconsin promulgated a model wind siting ordinance for use by Wisconsin towns and counties. Wisconsin Model Wind Ordinance for Towns/Counties (Feb. 7, 2007), *available at* [www.windaction.org/documents/13190](http://www.windaction.org/documents/13190). In Kansas, the state Energy Council issued the “Wind Energy Siting Handbook,” which offers “voluntary guideline options for Kansas cities and counties to consider in response to possible wind energy developments in their area.” *Kansas Energy Council, Wind Energy Siting Handbook: Guideline Options for Kansas Cities and Counties* 2 (2005), *available at* [http://kcc.kansas.gov/reports/wind\\_siting\\_handbook.pdf](http://kcc.kansas.gov/reports/wind_siting_handbook.pdf). The handbook encourages, but does not require, local officials to adopt standards in a number of common areas of concern, including land use management, noise management, protection of natural and biological resources, soil erosion and water quality, visual impact, safety, and community outreach. *Id.* at 6–10. The handbook also provides local governments with siting application templates. *Id.* at 31–42. Interestingly, a Kansas bill currently under consideration would preempt all local regulations “restricting or prohibiting the use of any wind turbine or any other equipment used for wind power[.]” H.B. 2043, Sess. of 2009, *available at* [www.kslegislature.org/bills/2010/2043.pdf](http://www.kslegislature.org/bills/2010/2043.pdf) (“On and after the effective date of this act, any provision of a city or county ordinance, resolution or regulation restricting or prohibiting the use of any wind turbine or any other equipment used for wind power installed on or adjacent to buildings is hereby declared to be against public policy and such provision shall be void and unenforceable.”).
- c. In another group of states, the authority to site and permit wind projects is split based on the size of the project, with a state agency, such as the public utilities commission or a state siting council, charged with siting larger scale wind energy facilities. *See* NCSL State Siting ii. *See also* *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275 (2008). *See also* Minn. Stat. §§216F.01 et seq. and Minn. R. 7836.0100 et seq. (requiring a site permit from the state public utilities commission for large wind energy conversion systems (those with a capacity of more than 5,000 kilowatts)); Ohio Administrative Code 4906-5-01 (requiring approval from the state power siting board for major utility facilities (those with a capacity of more than 50 MW)). In New Hampshire, local governments have siting authority for small wind energy projects used primarily for on-site generation, and projects with more than 30MW of capacity fall under the purview of the New Hampshire Site Evaluation Committee. H.B. 310, Ch. 357 of the Laws of 2008 Session (N.H. (signed 7/11/2008)), *available at* [www.gencourt.state.nh.us/legislation/2008/HB0310.html](http://www.gencourt.state.nh.us/legislation/2008/HB0310.html), *codified at* R.S.A. §§674:62–674:66. *See* New Hampshire Office of Energy and Planning, Governor’s Office of Energy and Community Services, New Hampshire Energy Plan, [www.nh.gov/oep/programs/energy/documents/Ch204.pdf](http://www.nh.gov/oep/programs/energy/documents/Ch204.pdf), at 4-3 (2002); R.S.A. §162-H:2 (defining “renewable energy facility” to include electric generation plants operating at a capacity of 30MW or more); R.S.A. §162-H:5 (requiring any energy facility to obtain a certificate from the Site Evaluation Committee). In Connecticut, a state Siting Council regulates the siting of all renewable energy facilities greater than 1 MW. Conn. Gen. Stat. §16-50(g) et seq. (West 2007) (establishing the Connecticut Siting Council that regulates all electric generators over 1 MW). State siting requirements typically focus

on issues of common concern, including requirements for aesthetics, setbacks, noise levels, safety, and shadow flicker. *See, e.g.*, Connecticut Siting Council, Application Guide for an Energy Generating Facility, at 6 (Jan. 2009), *available at* [www.ct.gov/csc/lib/csc/guides/guidesonwebsite0308/elec\\_gen\\_application\\_guide\\_20090113135115.pdf#31223](http://www.ct.gov/csc/lib/csc/guides/guidesonwebsite0308/elec_gen_application_guide_20090113135115.pdf#31223) (providing state requirements for service life and capacity, waste disposal, noise abatement, emergency operations, and shutdowns and traffic safety); Minn. R. 7836.0500 (providing that the application must include detailed information about the project, including information about the proposed site, plans for construction, costs, and environmental impact); Ohio, [www.opsb.ohio.gov/OPSB/cases/case.cfm?id=4284](http://www.opsb.ohio.gov/OPSB/cases/case.cfm?id=4284) (requirements for aesthetics, setbacks, noise levels, ice throw, blade shear, and shadow flicker). State siting agencies may also require developers to undergo environmental impact assessments and to solicit and respond to concerns of the local community. *See, e.g.*, Minn. R. 7836.0900 (3)-(5). (The Minnesota statute also provides for some amount of local participation in the siting process. Affected landowners and local governments receive a copy of permit applications and have at least 30 days to submit comments. The state then holds a public comment meeting for each application, and may hold a contested case meeting if requested by the public.)

## 2. *Examples Of Local Regulation/Zoning*

- a. Wind power generation has a great potential to reduce our reliance on greenhouse gas-emitting fossil fuels, but its use brings along a number of negative impacts. Wind energy facilities raise visual concerns ranging from the destruction of scenic views to the shadow flicker effect, and they may also be noisy. *See generally* [www.powernaturally.org/Programs/Wind/toolkit/5\\_otherpotenviroimpactsrevised.pdf](http://www.powernaturally.org/Programs/Wind/toolkit/5_otherpotenviroimpactsrevised.pdf). They require safety regulation; access to the machinery must be restricted due to high voltages; blades can cause ice throw; and occasional machinery failures can lead to fires, oil spills, and flying blades. *See generally* [www.businessweek.com/globalbiz/content/aug2007/gb20070824\\_562452.htm](http://www.businessweek.com/globalbiz/content/aug2007/gb20070824_562452.htm); [www.powernaturally.org/Programs/Wind/toolkit/23\\_frequentlyasked-questions.pdf](http://www.powernaturally.org/Programs/Wind/toolkit/23_frequentlyasked-questions.pdf), 9–11. Wind energy facilities may have negative environmental impacts as well, interfering with wildlife such as birds and bats. *See generally* [www.powernaturally.org/Programs/Wind/toolkit/4\\_birdsbatsrevised.pdf](http://www.powernaturally.org/Programs/Wind/toolkit/4_birdsbatsrevised.pdf); [www.powernaturally.org/Programs/Wind/toolkit/gaowind.pdf](http://www.powernaturally.org/Programs/Wind/toolkit/gaowind.pdf). Additionally, the construction of wind farms, which often entails heavy traffic, significant road repairs, and infrastructure improvements, can cause major impacts on host communities. *See generally* [www.powernaturally.org/Programs/Wind/toolkit/5\\_otherpotenviroimpactsrevised.pdf](http://www.powernaturally.org/Programs/Wind/toolkit/5_otherpotenviroimpactsrevised.pdf); [www.powernaturally.org/Programs/Wind/toolkit/7\\_visualimpactupfront.pdf](http://www.powernaturally.org/Programs/Wind/toolkit/7_visualimpactupfront.pdf)
- b. For these reasons, municipalities that have wind potential have increasingly begun to enact regulations governing the siting, construction, operation, and decommissioning of wind turbines. Wind turbines may be specifically permitted in some districts and prohibited from others, or they may be allowed only in wind overlay zones. [www.powernaturally.org/Programs/Wind/toolkit/2\\_windenergymodel.pdf](http://www.powernaturally.org/Programs/Wind/toolkit/2_windenergymodel.pdf), at 3. Some type of special permit is typically required, often in conjunction with site design and environmental review. *Id.* Wind ordinances may include separate provisions for building-mounted turbines, turbines intended to generate energy primarily for on-site use, and larger wind energy facilities intended to supply energy to the grid. Town of Ithaca, Local Law No. 13 of 2007, [http://74.125.95.132/search?q=cache:8XK8v\\_JI6hcJ:www.treca.org/documents/TownOfIthacaLocalLawWindPower2007-18-07.doc+town+of+ithaca+local+law&hl=en&ct=cln](http://74.125.95.132/search?q=cache:8XK8v_JI6hcJ:www.treca.org/documents/TownOfIthacaLocalLawWindPower2007-18-07.doc+town+of+ithaca+local+law&hl=en&ct=cln)

- [k&cd=6&gl=us](#) (wind turbines as accessory uses); Town of South Bristol (defines residential windmills as those used to provide on-site electricity to a dwelling and defines commercial windmills as those used to provide on-site electricity to commercial enterprises); Cohocton (restricting large wind facilities to the agricultural-residential district); Martinsburg (definition of wind power generating facility); Westfield; South Bristol, §170-42 (prohibits industrial windmills). The Town of Bethany specifically prohibits large wind energy facilities, but it provides that if its regulations are invalidated, such turbines will nevertheless be subject to special permit review, performance bond requirements, increased setbacks, and the completion of a Host Community Benefits Agreement.
- c. Local wind laws impose varying height restrictions on wind towers. Some of the height regulations imposed on turbines are maximum values, intended to protect viewsheds and other visual aspects of the landscape. *See* [www.governmentlaw.org/files/ZLPR-Planning\\_Zoning\\_windpower.pdf](http://www.governmentlaw.org/files/ZLPR-Planning_Zoning_windpower.pdf) at 4. The Town of Bethany, for example, encourages small turbines as “a cost effective mechanism for reducing on-site electric costs[,]” but it does not support large wind facilities, as these would negatively impact viewsheds and possibly lower property values. Accordingly, Bethany’s 2008 wind law limits the height of turbines to 80 feet if located on parcels smaller than five acres, and to 150 feet on larger parcels. In contrast, the Town of Cohocton, which permits utility-scale wind energy generation facilities, sets the maximum height at 500 feet. Town of Cohocton, Windmill Local Law, [www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf](http://www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf)
  - d. For safety reasons, wind ordinances also often specify the lowest minimum distance permitted between the ground and the tips of the blades. [www.powernaturally.org/Programs/Wind/toolkit/2\\_windenergymodel.pdf](http://www.powernaturally.org/Programs/Wind/toolkit/2_windenergymodel.pdf), at 5. In Ithaca, for example, the lowest part of the turbine blade must pass no closer to the ground than 30 feet, and for building mounted turbines, Ithaca requires the blades to be at least 15 feet above any “outdoor surfaces intended for human occupancy . . . that are located directly below the facility.” Town of Ithaca, Local Law No. 13 of 2007, [http://74.125.95.132/search?q=cache:8XK8v\\_JI6hcJ:www.treea.org/documents/TownOfIthacaLocalLawWindPower2007-18-07.doc+town+of+ithaca+local+law&hl=en&ct=clnk&cd=6&gl=us, §270-219.4. The Town of Eden’s 2004 wind ordinance takes a slightly different approach and measures the 30-foot minimum turbine blade height from the highest existing structure or tree within a 250-foot radius. Town of Eden, Local Law No. 3 of 2004, \[www.ecode360.com/?custId=ED1729\]\(http://www.ecode360.com/?custId=ED1729\), sec. 217-4 \(C\) \(11\).](http://74.125.95.132/search?q=cache:8XK8v_JI6hcJ:www.treea.org/documents/TownOfIthacaLocalLawWindPower2007-18-07.doc+town+of+ithaca+local+law&hl=en&ct=clnk&cd=6&gl=us,_%270-219.4)
  - e. Setback requirements are another regulation commonly found in wind laws, and they serve to mitigate aesthetic impacts as well as to protect adjacent property from turbine dangers such as ice throws and collapses. *See generally* [www.powernaturally.org/Programs/Wind/toolkit/2\\_windenergymodel.pdf](http://www.powernaturally.org/Programs/Wind/toolkit/2_windenergymodel.pdf) (discussing setbacks); [www.powernaturally.org/Programs/Wind/toolkit/6\\_visualimpactupfront.pdf](http://www.powernaturally.org/Programs/Wind/toolkit/6_visualimpactupfront.pdf) (discussing visual impacts); [www.gepower.com/prod\\_serv/products/tech\\_docs/en/downloads/ger4262.pdf](http://www.gepower.com/prod_serv/products/tech_docs/en/downloads/ger4262.pdf) (discussing ice throw mitigation). Nearly all local wind laws require wind turbines to be set back from residences, power lines, public roads, and property lines. [www.powernaturally.org/Programs/Wind/toolkit/2\\_windenergymodel.pdf](http://www.powernaturally.org/Programs/Wind/toolkit/2_windenergymodel.pdf), 4. The Town of Ellington, New York also specifies setback distances from wetlands and gas wells. Setbacks may be measured as a specific distance, or they may be calculated using a formula based on the turbine’s height. In Cohocton, New York, the setback for a non-industrial turbine from property lines and roads is

equal to one and one-half times its height. Town of Cohocton, Windmill Local Law, [www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf](http://www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf), section I(B)(1). Industrial turbines must be set back a distance equal to their height plus 100 feet from property lines, roads, and power lines, and they must also be at least 1,500 feet removed from any residences or areas normally used by the public. Town of Cohocton, Windmill Local Law, [www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf](http://www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf), section II(B)(1). Some towns use a setback formula based on the estimated ice/blade throw distance. Town of South Bristol, Local Law No. 2 of 2003, [www.gflrpc.org/programareas/wind/LL/TofSouthBristol.pdf](http://www.gflrpc.org/programareas/wind/LL/TofSouthBristol.pdf), sec. 170-40 (B) (1) (residential); sec. 170-41 (B) (1) (commercial).

- f. Height restrictions and setbacks are only two of the ways in which local governments have attempted to mitigate the visual impacts of wind turbines. Many wind ordinances require the completion of a visual impact assessment as part of the permitting process. Town of Bethany, Local Law No. 1 of 2008, [www.townofbethany.com/other%20pdf%20files/WindEnergyZoningAmendments.pdf](http://www.townofbethany.com/other%20pdf%20files/WindEnergyZoningAmendments.pdf); Town of South Bristol, Local Law No. 2 of 2003, [www.gflrpc.org/programareas/wind/LL/TofSouthBristol.pdf](http://www.gflrpc.org/programareas/wind/LL/TofSouthBristol.pdf); Town of Westfield, Local Law No. 2 of 2002, [www.ecode360.com/?custId=WE1631](http://www.ecode360.com/?custId=WE1631); Town of Ellington (digital visibility map and computer rendered simulations); City of Lackawanna, [www.e-codes.generalcode.com/codebook\\_frameset.asp?ep=fs&lg=1&t=ws&cb=1978\\_A](http://www.e-codes.generalcode.com/codebook_frameset.asp?ep=fs&lg=1&t=ws&cb=1978_A), §230-85 (A)(c). For example, in one municipality, the visual impact analysis must address impacts within a five mile radius, and applicants may be required to submit scenic resource maps, viewshed maps, photographic simulations, and suggested visual mitigation strategies. Town of Cohocton, Windmill Local Law, [www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf](http://www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf). Other common provisions require turbines and blades to be painted in neutral, non-reflective colors, and many prohibit wind facilities from displaying advertisements. Town of Bethany, Local Law No. 1 of 2008, [www.townofbethany.com/other%20pdf%20files/WindEnergyZoningAmendments.pdf](http://www.townofbethany.com/other%20pdf%20files/WindEnergyZoningAmendments.pdf), p. 9; Town of Hamlin, Local Law No. 3 of 2008, [www.hamlinny.org/pdf/wind-tower/2009/Approved-Local-Law-on-Wind-Energy-Facilities.pdf](http://www.hamlinny.org/pdf/wind-tower/2009/Approved-Local-Law-on-Wind-Energy-Facilities.pdf), p. 10 (ordinance annulled); Town of Ithaca, Local Law No. 13 of 2007, [http://74.125.95.132/search?q=cache:8XK8v\\_JI6hcJ:www.treca.org/documents/TownOfIthacaLocalLawWindPower2007-18-07.doc+town+of+ithaca+local+law&hl=en&ct=clnk&cd=6&gl=us](http://74.125.95.132/search?q=cache:8XK8v_JI6hcJ:www.treca.org/documents/TownOfIthacaLocalLawWindPower2007-18-07.doc+town+of+ithaca+local+law&hl=en&ct=clnk&cd=6&gl=us); Town of Ellington, p. 16 (nonreflective matte color or camouflage); Town of South Bristol, Local Law No. 2 of 2003, [www.gflrpc.org/programareas/wind/LL/TofSouthBristol.pdf](http://www.gflrpc.org/programareas/wind/LL/TofSouthBristol.pdf) (battleship gray). Town of Bethany, Local Law No. 1 of 2008, [www.townofbethany.com/other%20pdf%20files/WindEnergyZoningAmendments.pdf](http://www.townofbethany.com/other%20pdf%20files/WindEnergyZoningAmendments.pdf), p. 10; Town of Ithaca, Local Law No. 13 of 2007, [http://74.125.95.132/search?q=cache:8XK8v\\_JI6hcJ:www.treca.org/documents/TownOfIthacaLocalLawWindPower2007-18-07.doc+town+of+ithaca+local+law&hl=en&ct=clnk&cd=6&gl=us](http://74.125.95.132/search?q=cache:8XK8v_JI6hcJ:www.treca.org/documents/TownOfIthacaLocalLawWindPower2007-18-07.doc+town+of+ithaca+local+law&hl=en&ct=clnk&cd=6&gl=us); Town of Ellington pp. 15–16. Lighting is generally limited to that required by the Federal Aviation Administration, and transmission lines are typically required to be placed underground. Town of Cohocton, Windmill Local Law, [www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf](http://www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf), pp. 2, 8; Town of Eden, Local Law No. 3 of 2004, [www.ecode360.com/?custId=ED1729](http://www.ecode360.com/?custId=ED1729), p. 5; Town of Ellington, p. 15 (also requiring that ground level security lighting be designed to minimize light pollution); Town of South Bristol, Local Law No. 2 of 2003, [www.gflrpc.org/programareas/wind/LL/TofSouthBristol.pdf](http://www.gflrpc.org/programareas/wind/LL/TofSouthBristol.pdf), §170-40(B)(6)(a); Town of Westfield, Local Law No. 2 of 2002, [www.ecode360.com/?custId=WE1631](http://www.ecode360.com/?custId=WE1631), p. 3; Town of Bethany, Local

Law No. 1 of 2008, [www.townofbethany.com/other%20pdf%20files/WindEnergyZoningAmendments.pdf](http://www.townofbethany.com/other%20pdf%20files/WindEnergyZoningAmendments.pdf) (providing that all wiring is to be underground or on existing wires, except for tie-in lines and by permission of the town board for reasons relating to the terrain); Town of Ithaca, Local Law No. 13 of 2007, [http://74.125.95.132/search?q=cache:8XK8v\\_JI6hcJ:www.treca.org/documents/TownOfIthacaLocalLawWindPower2007-18-07.doc+town+of+ithaca+local+law&hl=en&ct=clnk&cd=6&gl=us](http://74.125.95.132/search?q=cache:8XK8v_JI6hcJ:www.treca.org/documents/TownOfIthacaLocalLawWindPower2007-18-07.doc+town+of+ithaca+local+law&hl=en&ct=clnk&cd=6&gl=us) (requiring underground wires, except for wires going from the turbine to the base, and all wiring associated with building mounted turbines); Town of South Bristol, Local Law No. 2 of 2003, [www.gflrpc.org/programareas/wind/LL/TofSouthBristol.pdf](http://www.gflrpc.org/programareas/wind/LL/TofSouthBristol.pdf), §140-40(C)(9). A few ordinances require wind turbine applicants to assess the “shadow flicker effect.” For example, one municipality provides that the shadow flicker must be limited to less than 30 hours per year and 30 minutes per day. Town of Bethany, Local Law No. 1 of 2008, [www.townofbethany.com/other%20pdf%20files/WindEnergyZoningAmendments.pdf](http://www.townofbethany.com/other%20pdf%20files/WindEnergyZoningAmendments.pdf).

- g. Aside from visual impacts, the noise that can be generated from spinning blades can cause concern. For this reason, local wind laws typically impose noise limits of about 50 decibels, measured from adjacent property lines. Town of Bethany, Local Law No. 1 of 2008, [www.townofbethany.com/other%20pdf%20files/WindEnergyZoningAmendments.pdf](http://www.townofbethany.com/other%20pdf%20files/WindEnergyZoningAmendments.pdf); Town of Cohocton, Windmill Local Law, [www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf](http://www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf); Town of Eden, Local Law No. 3 of 2004, [www.ecode360.com/?custId=ED1729](http://www.ecode360.com/?custId=ED1729); Town of Ithaca, Local Law No. 13 of 2007, [http://74.125.95.132/search?q=cache:8XK8v\\_JI6hcJ:www.treca.org/documents/TownOfIthacaLocalLawWindPower2007-18-07.doc+town+of+ithaca+local+law&hl=en&ct=clnk&cd=6&gl=us](http://74.125.95.132/search?q=cache:8XK8v_JI6hcJ:www.treca.org/documents/TownOfIthacaLocalLawWindPower2007-18-07.doc+town+of+ithaca+local+law&hl=en&ct=clnk&cd=6&gl=us); Town of Westfield, Local Law No. 2 of 2002, [www.ecode360.com/?custId=WE1631](http://www.ecode360.com/?custId=WE1631). The Town of Ellington, in addition to a noise limit, requires the establishment of a “noise complaint and investigation process[.]”
- h. Safety provisions make up a large portion of most wind ordinances. Nearly all wind ordinances require an engineer to certify that towers are designed according to appropriate standards, and most require turbines to have automatic and/or manual braking systems. *See, e.g.*, City of Lackawanna, [www.e-codes.generalcode.com/codebook\\_frameset.asp?ep=fs&lg=1&t=ws&cb=1978\\_A](http://www.e-codes.generalcode.com/codebook_frameset.asp?ep=fs&lg=1&t=ws&cb=1978_A), §230-85(A)(1)(e)(6); Town of Ellington, p. 6; Cazenovia, §165-30.1(F)(1); Town of Bethany, Local Law No. 1 of 2008, [www.townofbethany.com/other%20pdf%20files/WindEnergyZoningAmendments.pdf](http://www.townofbethany.com/other%20pdf%20files/WindEnergyZoningAmendments.pdf) (manual and automatic over-speed controls); Town of Cohocton, Windmill Local Law, [www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf](http://www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf) (automatic braking, governing, or feathering system); Town of Eden, Local Law No. 3 of 2004, [www.ecode360.com/?custId=ED1729](http://www.ecode360.com/?custId=ED1729) (manual and automatic controls required); Town of Ellington (manual and automatic); Town of Ithaca, Local Law No. 13 of 2007, [http://74.125.95.132/search?q=cache:8XK8v\\_JI6hcJ:www.treca.org/documents/TownOfIthacaLocalLawWindPower2007-18-07.doc+town+of+ithaca+local+law&hl=en&ct=clnk&cd=6&gl=us](http://74.125.95.132/search?q=cache:8XK8v_JI6hcJ:www.treca.org/documents/TownOfIthacaLocalLawWindPower2007-18-07.doc+town+of+ithaca+local+law&hl=en&ct=clnk&cd=6&gl=us) (braking system required); Town of South Bristol, Local Law No. 2 of 2003, [www.gflrpc.org/programareas/wind/LL/TofSouthBristol.pdf](http://www.gflrpc.org/programareas/wind/LL/TofSouthBristol.pdf), §170-40(D)(3); Town of Westfield, Local Law No. 2 of 2002, [www.ecode360.com/?custId=WE1631](http://www.ecode360.com/?custId=WE1631) (braking and emergency shutdown procedure required). Municipalities typically require applicants to demonstrate that access to the turbines will be limited by fences, locked gates, and/or high climbing pegs. Town of Bethany, Local Law No. 1 of 2008, [www.townofbethany.com/other%20](http://www.townofbethany.com/other%20)

[pdf%20files/WindEnergyZoningAmendments.pdf](#), p. 10; Town of Cohocton, Windmill Local Law, [www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf](#), p. 4; Town of Eden, Local Law No. 3 of 2004, [www.ecode360.com/?custId=ED1729](#), p. 4; Town of Ellington, p. 19; Town of South Bristol, Local Law No. 2 of 2003, [www.gflrpc.org/programareas/wind/LL/TofSouthBristol.pdf](#), §170-40(D)(2); Town of Westfield, Local Law No. 2 of 2002, [www.ecode360.com/?custId=WE1631](#), p. 2. Signs generally have to be posted to warn any passersby of high voltages and ice throws, although the number and placement of signs varies among local governments. Town of Bethany, Local Law No. 1 of 2008, [www.townofbethany.com/other%20pdf%20files/WindEnergyZoningAmendments.pdf](#), p. 10 (1 sign, no larger than 1' by 2', must be posted on the tower at a height of 5' warning of the risk of electric shock); Town of Eden, Local Law No. 3 of 2004, [www.ecode360.com/?custId=ED1729](#), p. 4. South Bristol's regulations, for instance, require warning signs to be posted at 100-foot intervals along the setback lines, and they must include the text "CAUTION: FALLING OBJECTS." Town of South Bristol, Local Law No. 2 of 2003, [www.gflrpc.org/programareas/wind/LL/TofSouthBristol.pdf](#), §170-40(D)(1). In Ellington, warning signs must include a local phone number for a 24-hour hotline, and in Bethany, warning signs must be located at a height of 5 feet (eye-level) on the base of any turbine. Town of Ellington, pp. 18–19; Town of Bethany, Local Law No. 1 of 2008, [www.townofbethany.com/other%20pdf%20files/WindEnergyZoningAmendments.pdf](#), p. 10. Other local governments simply require "appropriate" warning signs. Town of Westfield, Local Law No. 2 of 2002, [www.ecode360.com/?custId=WE1631](#), p. 3. Periodic turbine inspection and reporting requirements are also fairly common, as are provisions requiring reports on such things as ice throw calculations, blade throw calculations, and "catastrophic tower failure." Town of Cohocton, Windmill Local Law, [www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf](#), p. 5; Town of Ellington, p. 24; Town of Westfield, Local Law No. 2 of 2002, [www.ecode360.com/?custId=WE1631](#), p. 4; Town of Ellington, p. 12 (all three); City of Lackawanna, [www.e-codes.generalcode.com/codebook\\_frameset.asp?ep=fs&lg=1&t=ws&cb=1978\\_A](#), §230-85(A)(1)(j)-(l). And because none of these safety provisions are fail safe, most applicants are required to obtain liability insurance. Town of Cohocton, Windmill Local Law, [www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf](#), p. 5; Town of Eden, Local Law No. 3 of 2004, [www.ecode360.com/?custId=ED1729](#), p. 5; Town of Ellington, p. 18; Town of South Bristol, Local Law No. 2 of 2003, [www.gflrpc.org/programareas/wind/LL/TofSouthBristol.pdf](#), §170-40(F)(2); Westfield, Local Law No. 2 of 2002, [www.ecode360.com/?custId=WE1631](#), p. 3.

- i. Environmental considerations are another important feature of wind ordinances. In addition to completing State Environmental Quality Review Act ("SEQRA") review, some ordinances require an assessment of the impacts that turbines will have on migratory and resident birds, and others require the submission of certain information relating to storm water and erosion. Cazenovia, §165-30.1(D)(1)(f); Town of Cohocton, Windmill Local Law, [www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf](#), p. 9 (only required for industrial windmills); Town of Ellington, p. 17; City of Lackawanna, [www.e-codes.generalcode.com/codebook\\_frameset.asp?ep=fs&lg=1&t=ws&cb=1978\\_A](#), §230-85(B)(14). A few ordinances require applicants to post a surety to cover possible oil contamination. Town of South Bristol, Local Law No. 2 of 2003, [www.](#)

[www.gflrpc.org/programareas/wind/LL/TofSouthBristol.pdf](http://www.gflrpc.org/programareas/wind/LL/TofSouthBristol.pdf), §170-40(F)(6); Town of Cohocton, Windmill Local Law, [www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf](http://www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf), p. 6.

- j. Many local wind laws also include a section on decommissioning, requiring the applicant to submit a decommissioning plan and to post a performance bond. Town of Bethany, Local Law No. 1 of 2008, [www.gflrpc.org/programareas/wind/LL/TofSouthBristol.pdf](http://www.gflrpc.org/programareas/wind/LL/TofSouthBristol.pdf), p. 12; Town of Eden, Local Law No. 3 of 2004, [www.ecode360.com/?custId=ED1729](http://www.ecode360.com/?custId=ED1729), p. 5; Town of Ellington, p. 25; Town of Westfield, Local Law No. 2 of 2002, [www.ecode360.com/?custId=WE1631](http://www.ecode360.com/?custId=WE1631), p. 4. Because the construction of wind farms can result in vegetation clearance and road damage, many ordinances also require performance bonds to ensure that applicants restore any areas affected by construction. Town of Ellington, p. 20; Town of Cohocton, Windmill Local Law, [www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf](http://www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf), p. 10.
- k. The Adirondack Park Agency is currently discussing a staff proposal that would allow for a streamlined and expedited process for the siting of small-scale residential and commercial wind turbines up to a height of 125 feet within the 6 million acre park. In the Matter of the Issuance of a General Permit: For the Installation of Certain New Small-Scale Wind Turbines, General Permit 2009 G-1 (Draft, March 3, 2009), *available at* [www.apa.state.ny.us/Mailing/0903/Regulatory/GP%202009G-1%20Permit%20for%20Small%20Scale%20Wind%20Turbines%203-3-09.pdf](http://www.apa.state.ny.us/Mailing/0903/Regulatory/GP%202009G-1%20Permit%20for%20Small%20Scale%20Wind%20Turbines%203-3-09.pdf). Among the requirements in the proposal are that the turbines blend in with the surroundings so as to be “substantially invisible,” consistent with the Agency’s policy on the siting of telecommunications towers. *Id.* This blending is to be accomplished with consideration of design, size, location, and color of the turbines. The proposal also limits blade diameter to 25 feet, and the towers must be set back at least 150 feet from property line boundaries. *Id.* The review criteria require that permit applications be consistent with the information contained in the application; conform with the Agency’s “Policy on Agency Review of Proposals for New Telecommunications Towers and Other Tall Structures in the Adirondack Park”; not require additional significant detailed engineering or environmental studies to more fully demonstrate no undue adverse impacts on important visual resources of the Park; not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational, or open space resources of the Park or on the ability of the public to provide supporting facilities and services made necessary by the project, taking into account the economic and social benefits that might be derived; not adversely affect historic or archeological resources or rare, threatened, or endangered species; and be capable of meeting the conditions contained within the general permit and as stated in “Permit Conditions” of the certification form. In the Matter of the Issuance of a General Permit: For the Installation of Certain New Small-Scale Wind Turbines, General Permit 2009G-1 (Draft, March 3, 2009), *available at* [www.apa.state.ny.us/Mailing/0903/Regulatory/GP%202009G-1%20Permit%20for%20Small%20Scale%20Wind%20Turbines%203-3-09.pdf](http://www.apa.state.ny.us/Mailing/0903/Regulatory/GP%202009G-1%20Permit%20for%20Small%20Scale%20Wind%20Turbines%203-3-09.pdf).
3. *Using Host Community Agreements.* This section is largely excerpted from the author’s recent article: “Host Community Agreements for Wind Farm Development” (with Spitzer and Bookser), *New York Zoning and Planning Law Report*, vol. 9 no. 5 (March/April 2009).

- a. 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.
- b. 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. 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 [www.wnypapers.com/news/2005/11/t24\\_ton.htm](http://www.wnypapers.com/news/2005/11/t24_ton.htm). For wind farms, the payments are usually based on the maximum megawatt output of each wind turbine installed in the municipality. *See, e.g.,* HCA between Canandaigua Power Partners, LLC, and the Town of Cohocton, NY, at §3, available at [www.cohoctonfree.com/UPC/HostAgreement082407.pdf](http://www.cohoctonfree.com/UPC/HostAgreement082407.pdf). The actual output of any individual wind turbine depends 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 simply cannot handle the heavy construction traffic. *See generally* NSERDA, Power Naturally, Other Potential Environmental Impacts at 17–18; NSERDA, Power Naturally, Agricultural Impacts Resulting from Wind Farm Construction, [www.powernaturally.org/Programs/Wind/toolkit/7\\_visualimpactupfront.pdf](http://www.powernaturally.org/Programs/Wind/toolkit/7_visualimpactupfront.pdf). 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 vehicles engaged in decommissioning at project end present continued impacts.
- c. HCAs address these concerns with agreements for remediation and reconstruction as necessary. A typical road use HCA, in addition to providing payment for a town-retained road expert, will have several components:
  - i. *Pre-Construction Improvements*. The wind company identifies and upgrades roads, culverts, intersections, or bridges as necessary.
  - ii. *Pre-Construction Post-Improvement Road Survey*. A survey is made by the 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 an-

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.

iii. *Construction Phase.* During the construction phase it is vital that roads remain open in a safe condition and that repairs be made on an ongoing basis to fix potholes and other safety threats. A properly drawn HCA provides for an independent monitor throughout construction, paid for by the wind company.

iv. *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 a community 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.

- d. Other HCA provisions address ongoing 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.
- e. Finally, most HCAs 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. Telecommunication towers are another highly visible use on which communities often impose decommissioning responsibilities. 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 do not, including the methodology for updating removal cost estimates over the life of the project. HCAs are ideal vehicles to address these complex requirements.
- f. Absent litigation on the use of HCAs for wind farm development, practitioners should be aware that some have questioned whether they are a form of illegal contract zoning, whether they are a back-door way of achieving development agreements or impact fees in states that do not authorize these tools, and whether they conflict with authority for environmental mitigation measures stemming from state environmental review laws.

#### 4. *Litigating Wind Turbine Cases*

- a. The controversy surrounding the siting of wind turbines is readily apparent from the amount of litigation across the country challenging various aspects of siting laws and environmental laws and testing the limits of public and private nuisance common law. A survey of some recently reported court decisions follows. These summaries, along with other wind and climate change information, can be accessed from the author's blog, [www.lawoftheland.wordpress.com](http://www.lawoftheland.wordpress.com).

i. *Vermont Supreme Court Upholds Approval Of Wind Generation Facility, Noting Among Other Things Economic Benefits To The Region And Support For Alternative Energy In The Regional Plan*

(1) Although acknowledging that the project would have some negative impacts on aesthetics, the Vermont Public Service Board nonetheless issued a certificate of public good for a wind generation facility to be located in Sheffield and consist of 16 turbines with rotors 315 feet in diameter on towers 262 feet high, concluding that the impacts would not be unduly adverse. Each tower would have a 16-foot diameter at the base, tapering to 9 feet in diameter just below the nacelle. The facility will be located on a ridge and will serve more than 15,000 homes, roughly 45 percent of households in northeastern Vermont. A citizen action group (Ridge Protectors) challenged the Board's evaluation of a number of statutory factors necessary for the certificate of public good.

(2) The Vermont Supreme Court affirmed the Board's approval. The court noted that the finding that the project will result in an "economic benefit to the state" was only part of the analysis of whether the project will "promote the general good," as required by 30 Vt. Stat. Ann. tit. 30, §248(b). The court said that the Board explained that:

the project would create new jobs, increase tax revenue, generate substantial lease payments to the owners of the land on which the project was located, and draw on local sources for construction materials. It would also result in significant tax and mitigation payments to the Town of Sheffield, as well as confer a benefit on all ratepayers in New England.

The court also stated that:

The promotion of the general good of the state can plainly encompass the potential for even greater economic benefit from taking advantage of a particular efficiency, such as a sustainable no-cost fuel source, as envisioned by the Board's decision.

(3) Further, the court determined that the Board acted within its discretion in imposing a condition that the applicant make efforts to enter into contracts to sell power for stable prices so that it can use post-certification proceedings to evaluate compliance. Additionally, the court held that the Board did not err in finding that the project "will not unduly interfere with the orderly development of the region," giving due consideration to the regional plan, which describes the site as a "rural area" but does not prohibit the use. The board adequately considered aesthetic impact, according to the court, which noted findings that the regional plan does not include aesthetic standards and that the facility would not be shocking or offensive to the average person. The court also pointed out that regional plan expressly recognized that wind energy needed to be considered as a resource to meet the region's current and future energy needs. Although acknowledging that the project is out of character with its surroundings, the court agreed that views of it would be from a distance and intermittent. Lastly, the court noted that the Board did consider visibility and mitigation measures and that its findings clearly show how it reached its decision. *In re UPC Vt. Wind, LLC*, 2009 WL 279971, 2009 VT 19 (VT. 2/6/2009).

ii. *Second Appellate Court In New York Upholds Determination That A Wind Farm Is A Public Utility*

(1) In 2008 the New York Appellate Division, Third Department, upheld a determination that a wind farm qualifies as public utility. A second appellate court has now held that the zoning board's classification of a series of wind-powered generators as a utility was neither irrational nor unreasonable, and that the determination was supported by substantial evidence. The court noted that the zoning ordinance defined utilities as "telephone dial equipment centers, electric or gas substations, water treatment or storage facilities, pumping stations and similar facilities." This decision is significant because public utilities are entitled to a relaxed standard of review in zoning matters. *Wind Power Ethics Group v. Zoning Board of Appeals of the Town of Cape Vincent*, 2009 WL (N.Y.A.D. 4 Dept. 3/20/2009).

iii. *Court Upholds Use Of Eminent Domain For Wind Energy And Finds That Ethics Allegation Was Procedurally Flawed*

(1) Following the town board's condemnation of a portion of the petitioners' property to create easements to enable the placement of underground electricity lines for a wind farm project, the petitioners challenged the action, alleging that the town supervisor, who cast the deciding vote on both the resolution commencing the condemnation proceedings and the resolution approving the condemnation, had a conflict of interest that required recusal. The court, however, citing *Matter of Pfohl v. Village of Sylvan Beach*, 26 A.D.3d 820 (4th Dept. 2006), said that since the appeal was made pursuant to the state Eminent Domain Procedure Law (section 207(C)) (EDPL), their review was:

limited to whether the proceeding was in conformity with constitutional requirements, whether the proposed acquisition is within the statutory jurisdiction or authority of the condemnor, whether the condemnor's determination and findings were made in accordance with the procedures set forth in EDPL article 2 and ECL article 8, and whether a proposed [public] use, benefit or purpose will be serviced by the acquisition.

The court determined that conflicts of interest allegations should be raised in a proceeding pursuant to Civil Practice Law Rules Article 78, and that the EDPL is not the proper procedural vehicle to resolve that allegation.

(2) The court also concluded that the petitioners failed to meet their burden of establishing that the town board's determination was "without foundation and baseless," since the board findings stated that the condemnation for the purpose of creating easements would "create jobs, provide infrastructure, and possibly stimulate new private sector economic development." These, said the court, demonstrate the requisite public use or public benefit. *Dudley v. Town Board of Prattsburgh*, 2009 WL 279898 (N.Y.A.D. 4 Dept. 2/6/2009).

iv. *Wind Turbine Law Invalidated For Failure To Comply With Environmental Review Act*

(1) The Monroe County Supreme Court invalidated the Town of Hamlin (New York) wind turbine law due to an improper Negative Declaration under SEQRA. The court concluded that, even though the board identified "the relevant areas of environmental concern" in arriving at its Determination of Non-Significance/Negative Declaration, the board did not take a "hard look" at them or set forth a "reasoned elaboration" for its determination. Moreover, the court disagreed with respondent's characterization that the wind facilities that were allowed before the enactment of Local Wind Law 3-2008 were public utilities. The petitioners appear

to have been concerned about proposed setback and noise standards. The court ruled that it is not appropriate to issue a negative declaration based merely on the fact that the new law is more restrictive than existing law (which does not set forth any set standards) or that the zoning law does not constitute a decision on a specific wind turbine application. Although the decision is not clear on this, another apparent defect in process was treating action as unlisted action, when the SEQRA regulations define Type I action as including change in permissible uses for 25 or more acres of land. *Hamlin Preservation Group v. Town Board of the Town of Hamlin*, Index No. 2008/11217 (Monroe County Supreme Court, Jan. 5, 2009).

v. *District Court Dismisses Complaint Over Denial Of Residential Windmill For Failure To State A Claim Upon Which Relief Can Be Granted*

(1) Following the denial of a building permit in 2005 to enable him to build and operate a residential windmill, the plaintiff filed a federal lawsuit pro se, alleging that the town, the building inspector, and the zoning board of appeals violated his civil rights. Specifically, the plaintiff alleged that they denied him his due process rights, violated equal protection, and threatened retribution for the plaintiff seeking remedy. The federal district court concluded that since the plaintiff only alleged that the building inspector made a decision denying the plaintiff's permit application and that the plaintiff did not agree with the denial, this alone did not implicate any constitutional or statutory provisions. The court said that a mere conclusory allegation without more fails to state a claim upon which relief can be granted. All the plaintiff did was list constitutional provisions in his complaint without any factual support. Further, the court noted that the plaintiff did not allege involvement of the town or the zoning board of appeals, only the building inspector. Since the plaintiff filed the action pro se, the court gave him until the end of the month to file an amended complaint that includes specific detail and exhibits. Stay tuned. *Christian v. Town of Riga*, 2009 WL 63049 (W.D.N.Y. 1/6/2009).

vi. *State Energy Siting Law Applies To Wind Turbines And Preempts Local Zoning In Washington State*

(1) The Washington State Energy Facilities Site Locations Act governs the relocation, construction, and operating conditions of energy facilities in Washington. The law creates a process for determining energy facility locations across the state and requires site certification, a binding agreement between the applicant and the state, and conditions of approval that will ensure the applicant's compliance with regulations related to the construction and operation of the facility. The Energy Facility Site Evaluation Council is a multiagency body that administers the site certification process. The county where a proposed facility might be located appoints a representative to the Council for consideration of the application. The Council then holds a hearing on the proposed facility to determine whether it is consistent with the county land use plans and zoning laws.

(2) Horizon Wind Energy proposed 121 wind turbine towers in Kittitas County. The County had adopted a wind farm resource overlay zone ordinance. At the hearing, the Council and the County agreed that the application was inconsistent with the County ordinance. Although there was a lot of procedural wrangling and going back and forth, the bottom line is that the court held that the Energy Facilities Site Locations Act does not violate the state's Growth

Management Act in preempting the County's land use and zoning laws. There was substantial evidence to support the preemption, adequate mitigation of visual impacts, and no violation of the appearance of fairness doctrine. *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 2008 WL 4939317 (Wash. 11/20/2008).

vii. *Local Government Failed To Take A Hard Look At Local Law Regulating Industrial Wind Farms*

(1) The Town of Centerville, New York enacted Local Law No. 1 of 2006, which would have had the effect of changing the zoning for allowable uses within the town. The State Environmental Quality Review Act (SEQRA) classifies actions for purposes of triggering various environmental review procedures into Type I, Type II, and Unlisted action. The regulations provide that Type I actions require the completion of a full Environmental Assessment Form (EAF), and the regulations further provide that Type I actions include "the adoption of changes in allowable uses within any zoning district." (See 6 N.Y. Comp. Codes R.& Regs. Tit. 6, §617.4[b][2]). The town had declared itself the lead agency for purposes of conducting the environmental review and used the short EAF process rather than the full or long EAF process. Noting that the state regulations require a full EAF for Type I actions, the court said that the fact that the town failed to follow this procedure nullified its SEQRA negative declaration regarding the local law, and hence the trial court should have declared the local law invalid. *Centerville's Concerned Citizens v. Town Board of Town of Centerville*, 2008 WL 4891614 (N.Y.A.D. 4 Dept. 11/14/2008).

viii. *Texas Appeals Court Finds No Merit To Aesthetic Nuisance Claim Against Wind Farm*

(1) A Texas appeals court upheld a dismissal by the trial court of assertions of both public and private nuisance claims relating to the construction and operation of a wind farm. Specifically the court noted that the plaintiffs cannot assert a nuisance claim based on the wind farm's aesthetic impact. In applying Texas nuisance law, the court noted that "successful nuisance actions typically involve an invasion of a plaintiff's property by light, sound, odor, or foreign substance . . ." and that "Texas courts have not found a nuisance merely because of aesthetical-based complaints." The wind company argued that "sound public policy" supports this rule because "notions of beauty or unsightliness are necessarily subjective in nature and that giving someone an aesthetic veto over a neighbor's use of his land would be a recipe for legal chaos."

(2) The court noted that if the wind farm is a nuisance, "it is because Plaintiffs' emotional response to the loss of their view due to the presence of numerous wind turbines substantially interferes with the use and enjoyment of their property." The court concluded that such an emotional response is insufficient to constitute a nuisance cause of action under Texas law. Furthermore, the court found unpersuasive the plaintiff's assertion that although the wind farm was otherwise legal, it seemed abnormal and out of place with the surroundings, and that this made it a nuisance. *Rankin v. FPL Energy, LLC*, 2008 WL 3864829 (Tex. App. 8/21/2008).

ix. *D.C. Circuit Court Of Appeals Finds Wind Turbines Could Interfere With Airport Radar*

(1) In an administrative law case, Clark County, Nevada challenged a Federal Aviation Administration (FAA) determination that found that the siting of 83 wind turbines on federal land atop a mountain located 10 miles from a proposed new airport (targeted for operation

in 2017) would not exceed the federal obstruction standards, would not have a substantial adverse physical or electromagnetic interference on navigable airspace or air navigation facilities, and would not be a hazard to air navigation. The County challenged the FAA's determinations as arbitrary and capricious under the federal Administrative Procedure Act.

(2) The D.C. Circuit Court agreed with the County, remanding the matter for further consideration. Specifically, the court noted that the FAA failed to provide evidence in the record to support its determination; rather, evidence in the record suggested that 400-foot high wind turbines in close proximity to a proposed new airport could significantly interfere with radar systems at the airport. Clark County submitted a report from a consultant indicating that the turbines may have an impact on aviation safety and that the turbines would likely show up on the display of air traffic control radar at the future airport. Further, according to the consultant, since each turbine has a radar signature close to that of a jumbo jet, it could appear on the screen that the wind farm is a fleet of jumbo jets that may intermittently disappear, leading to possible confusion by air traffic controllers. Additionally, two departments within the FAA sent comments to the agency's Obstruction Evaluation Service indicating concerns over the proximity of the turbines to the proposed airport and possible impacts on air navigation facilities and navigational aids. The court was unsympathetic to the FAA's argument that these scenarios were all "if's, might's and maybe's." The court remanded the matter to the FAA for further review as the Agency failed to satisfy the requirement of reasoned decision making. *Clark County, Nevada v. Federal Aviation Administration*, 522 F.3d 437 (D.C. Cir. 2008).

x. *NY Appellate Court Finds Setback Requirements For Wind Turbines Do Not Amount To A Taking*

(1) Petitioners, opponents of a wind turbine generator project, alleged that the setback requirements contained in the Industrial Development Agency's findings statement amounted to a de facto taking. The court noted that the wind turbines will be located on land leased or purchased by Ecogen and that the Agency approved setback requirements that restrict the location of the turbines to ensure that they are a minimum distance from residences, public roads, and properties that do not contain turbines. The court found that since the setback requirements do not place any restrictions on property owners who do not consent to having turbines on their property, the setback requirements do not amount to a de facto taking. The court explained that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking with the meaning of the constitutional provision."

(2) The court also dismissed claims that the project, as approved by the Industrial Development Agency, violated the state constitution or the Energy Law, since the petitioners failed to allege any specific provisions that might have been violated. The court noted that the state Energy Law requires that owners and operators of alternative energy production facilities comply with "the rules and regulations of the state energy office." However, the absence of any applicable rules or regulations cannot be deemed to bar the project from proceeding. With respect to the state constitution, the court stated that the public health provision applies only to legislative bodies and imposes no duty on Ecogen or on the County Industrial Development Agency. *Matter of Advocates for Prattsburgh, Inc. v. Steuben County Indus. Dev. Agency*, 48 A.D.3d 1157 (4th Dept. 2/1/2008).