

GOVERNMENT LAW CENTER OF ALBANY LAW SCHOOL
GOVERNMENT LAW ONLINE

**New Code of Ethics for Wind Energy Companies
Doing Business in New York: A Back-Door
Approach to Regulating Municipal Ethics**

Winter 2009



ALBANY LAW SCHOOL

80 New Scotland Avenue
Albany, NY 12208
www.albanylaw.edu

© 2006 Albany Law School

GOVERNMENT LAW ONLINE publications are available at www.governmentlaw.org

*Reprinted with permission from the Municipal Lawyer Newsletter, Winter 2009, Vol. 23, No. 1,
published by the New York State Bar Association, One Elk Street, Albany, NY 12207.*

New Code of Ethics for Wind Energy Companies Doing Business in New York: A Back-Door Approach to Regulating Municipal Ethics

Winter 2009

Patricia E. Salkin

These materials are copyright by Albany Law School on behalf of its Government Law Center or Albany Law School licensors and may not be reproduced in whole or in part in or on any media or used for any purpose without the express, prior written permission of Albany Law School or the licensor. Neither Albany Law School, the Government Law Center or any licensor is engaged in providing legal advice by making these materials available and the materials should, therefore, not be taken as providing legal advice.

All readers or users of these materials are further advised that the statutes, regulations and case law discussed or referred to in these materials are subject to and can change at any time and that these materials may not, in any event, be applicable to a specific situation under consideration. The information provided in these materials is for informational purposes only and is not intended to be, nor should it be considered to be, a substitute for legal advice rendered by a competent licensed attorney or other qualified professional. If you have any questions regarding the application of any information provided in these materials to a particular situation, you should consult a qualified attorney or seek advice from the government entity or agency responsible for administering the law applicable to the particular situation in question.

New Code of Ethics for Wind Energy Companies Doing Business in New York: A Back-Door Approach to Regulating Municipal Ethics

By Patricia E. Salkin



I. Introduction

The conduct of municipal officials in New York is regulated through a series of state statutes and local laws including Article 18 of the General Municipal Law, which is primarily called into play when the conduct in question involves a contract; the Legislative Law which addresses, in part, local lobbying; and the Penal Law which deals

with, among other things, bribery and rewards for official actions. Scattered provisions in at least 11 volumes of McKinney's also provide some guidance on certain ethics and conflicts situations.¹ In addition, municipalities are directed and/or empowered to adopt their own code of ethics to address the conduct of public officers within their own jurisdiction.² Despite the appearance of many ethics laws and rules governing the conduct of municipal officials, the fact remains that New York lacks a comprehensive code of ethics for local governments, and that Article 18 of the General Municipal Law is in need of reform.³

New York also lacks a state-level office or agency responsible for providing guidance for municipal officials on ethics issues, issuing model local laws, and/or conducting training for municipal officials on ethics-related topics. Rather, numerous state governmental entities play small and distinct roles in providing interpretation, guidance and rulemaking when it comes to municipal ethics. For example, the Office of the State Comptroller may issue informal opinions on General Municipal Law Article 18 questions from municipal attorneys, and the Attorney General's Office may also issue informal opinions on conflicts of interest issues and on questions of compatibility of dual office holding. The Commission on Public Integrity is responsible for training on and enforcement of the Legislative Law, which contains provisions on municipal lobbying, and while the New York State Department of State provides information and training to municipal officials on a wide range of local government topics, there is no mandated comprehensive local ethics training and education or clearinghouse function. The disorganized situation in New York often puts municipal attorneys on the front line of ethics education, but unfortunately,

legal counsel is most often sought after the questioned activity has occurred. Calls for focused attention and for reform of municipal ethics in New York date back at least as far as 1987 with the work of the State Commission on Government Integrity, followed in 1991 by the work of the Temporary State Commission on Local Government Ethics. The leadership of the Municipal Law Section of the State Bar, through the work of its Ethics Committee, has been a leading advocate for reform. Despite these pleas, neither the last three Governors nor the State Legislature has made municipal ethics reform a priority topic.

Given the history of a fragmented approach to municipal ethics resulting in gaps in statutory coverage and lack of state-level guidance, it is not surprising that recent actions by the Attorney General aimed at curbing alleged unethical and perhaps illegal conduct on the part of wind energy companies may in fact be an avenue for indirectly regulating the conduct of the municipal officials. Following alleged corruption in Upstate New York between wind energy companies and local government officials⁴ that include allegations of conflicts of interest and improper influence surfacing in about a dozen counties,⁵ Attorney General Andrew Cuomo commenced an investigation to determine "whether wind companies improperly influenced local officials to get permission to build wind towers, as well as whether different companies colluded to divide up territory and avoid bidding against one another for the same land."⁶ In launching the investigation, the Attorney General stated, "The use of wind power, like all renewable energy sources, should be encouraged to help clean our air and end our reliance on fossil fuels. However, public integrity remains a top priority of my office and if dirty tricks are used to facilitate even clean-energy projects, my office will put a stop to it."⁷ Recently, an appellate court dismissed a petition calling for removal of a town legislator that alleged that the legislator concealed a conflict of interest when he voted to approve a wind energy facility because the project would include a turbine on his property, finding that the petitioner failed to prove the existence of an actual conflict of interest.⁸

II. Voluntary Code of Conduct for Wind Farm Development

On the heels of an investigation, in October 2008 the Attorney General unveiled a voluntary code of

conduct for wind development companies (referred to hereafter as “Code” or “Wind Code”) and announced that two companies that had been under investigation by the Attorney General (Noble and First Wind) had signed on to the Code, which is designed to make sure developers deal with local officials in a fair and transparent manner.⁹ The Code prohibits conflicts of interest between municipal officials and wind companies and establishes certain public disclosure requirements. Among other things, the Code bans wind companies from: hiring municipal employees or their relatives, giving gifts of more than \$10 during a one-year period, or providing any other form of compensation that is contingent on any action before a municipal agency. In addition, the Code prevents wind companies from soliciting, using, or knowingly receiving confidential information acquired by a municipal officer in the course of his or her official duties; requires wind companies to establish and maintain a public Web site to disclose the names of all municipal officers or their relatives who have a financial stake in wind farm development; requires wind companies to submit in writing to the municipal clerk for public inspection and to publish in the local newspaper the nature and scope of the municipal officer’s financial interest; mandates that all wind easements and leases be in writing and filed with the County Clerk; and requires that within thirty days of signing the Wind Industry Ethics Code, companies must conduct a seminar for employees about identifying and preventing conflicts of interest when working with municipal employees.¹⁰ The Code also sets up a Task Force to provide oversight of wind farm development and to monitor compliance with the Code.¹¹ The wind companies who sign on to the Code are required to provide a proportional share of funding to cover the administrative work of the Task Force for a period of three years.¹²

While on its face, the Code is aimed at the conduct of wind energy companies and their employees (and in fact, only the wind energy companies are signatories to the voluntary Code), the reality is that this Code impacts not only the conduct of corporate employees, but through controlling corporate conduct it also impacts municipal officials in terms of their conduct, required disclosure and similar requirements on their family members. It is likely that the Attorney General recognized gaps in the manner in which municipal ethics are addressed at the state level and saw an opportunity to begin to fill in where the statutes fall short. In some areas covered in the Code, it is possible that the State Legislature has preempted the field of regulation. Further, in some instances there are inconsistencies between the new Code and existing statutes that could lead to confusion. Lastly, provisions in locally adopted codes of ethics enacted pursuant to the General Municipal Law may also address some of the

items covered in the new Code.¹³ The remainder of this article explores the intersection of the Code of Conduct for Wind Farm Development and existing municipal ethics regulations at the State level.

III. Comparing the Code of Conduct to Existing Municipal Ethics Provisions

Many provisions in the Wind Code are consistent with the General Municipal Law ethics provisions. For example, the prohibition on contingent compensation in General Municipal Law § 805-a(d) appears in the Wind Code in § I. This same section of the Code contains a prohibition on wind companies soliciting or knowingly receiving confidential information acquired by a municipal officer in the course of his or her duties. This prohibition is complementary to General Municipal Law § 805-a(b), which prohibits municipal officers from disclosing confidential information. The remaining sections of this article focus on a number of areas in the Wind Code where provisions may conflict with state or local law, where inconsistencies or ambiguities may arise or where new concepts and controls have been introduced that impact the conduct of municipal officials.

A. Disclosure of Interests

As a general matter, when the State Legislature enacted Article 18 of the General Municipal Law they clearly recognized that there are unique ethics issues that may arise in the local land development process. Specifically, § 809(1) of the General Municipal Law provides,

Every application, petition or request submitted for a variance, amendment, change of zoning, approval of a plat, exemption from a plat or official map, license or permit, pursuant to the provisions of any ordinance, local law, rule or regulation constituting the zoning and planning regulations of a municipality shall state the name, residence and nature and extent of the interest of any state officer or any officer or employee of such municipality or of a municipality of which such municipality is a part, in the person, partnership or association making such application, petition or request . . . to the extent known to the applicant.

Further, the statute provides that a municipal

officer or employee shall be deemed to have an interest in the applicant when he, his spouse, or their brothers, sisters, parents, children, grandchildren, or the spouse of any of them . . . is a

party to an agreement with such applicant, express or implied, whereby he may receive any payment or other benefit, whether or not for services rendered, dependent or contingent upon the favorable approval of such application, petition or request.¹⁴

A knowing violation of this section constitutes a misdemeanor.

While consistent with the requirement in the General Municipal Law that the applicant provide the aforementioned disclosure, the second section of the Wind Code contains a number of public disclosure provisions that provide specific instructions as to how disclosure by the wind company about municipal official interests is to be made and to whom. Specifically, the Code requires that the Company provide a chart to the Office of the Attorney General (as well as posted to the Company Web site) that discloses the nature and scope of any financial interest held by a municipal officer or his or her relative for interests held prior to the date of the Code of Conduct. For events transpiring after the Code, the Company is required to “publicly disclose” the name of the municipal official and his/her relative that has a financial interest in any property identified for wind farm development and the nature and scope of the interest by submitting this information to the clerk of the municipality, publishing it in a newspaper of general circulation in the municipality, displaying it on the Company Web site and submitting it in writing to the Task Force and to the Attorney General. In addition, the Code requires that while the Company must file an abstract or memorandum of all wind easements and leases with the County Clerk, those that involve municipal officers or their relatives must also be posted on the Company Web site. Further, for those easements and leases that involve municipal officers or their employees, the Company must indicate in the abstract or memorandum the actual or estimated monetary consideration from monetary ranges provided in the Code.

The financial information required under the Code may go farther than the General Municipal Law requirements of simple disclosure in § 809. Further, §§ 811 and 812 of the General Municipal Law provide a framework for financial disclosure for local elected officials, persons seeking elective office and political party officials and certain officers and employees of counties, cities, towns and villages. Municipalities may adopt the form provided in § 812 or they may adopt their own. The voluntary Wind Code disclosure requirements apply to municipal officers, whether or not elected.

The disclosure requirements are interesting and, raise questions as to whether this area is preempted

by the existing disclosure requirements in Article 18 that specifically speak to disclosures in land use proceedings. Should stakeholders agree that increased disclosures and a process therefore could be better articulated in statute, this may be a good topic for a legislative program bill. Admittedly, the Attorney General is dealing only with the wind industry in this instance, but there are many other controversial land use applicants, such as big box retailers and wireless communication companies, where similar disclosures could be required if necessary and desired.

B. Gifts

Under General Municipal Law § 805-a(1), municipal officers are prohibited from soliciting or accepting a gift having a value of \$75 or more under circumstances where it can be reasonably inferred that the gift is intended to, or could reasonably be expected to, influence him or her in the performance of official duties, or was intended as a reward for official conduct. The Wind Code prohibits companies from giving municipal officers and their relatives or any third parties on behalf of the municipal officer any gift or gifts totaling more than \$10 in the aggregate during any one-year period (see § 1.2). The Wind Code, however, contains a definition section where the term “gift” is defined as “any thing having more than nominal value whether in the form of money, service, loan, investment, travel, entertainment, hospitality, or in any other form and includes an offer to a charitable organization at the designation of the Municipal Officer or at the designation of his or her relative.” By introducing the phrase “nominal value” into the definition section, the Code is seemingly consistent with the 2007 Public Employee Ethics Reform Act, which changed the \$75 gift limit in § 73(5) of the Public Officers Law to prohibit all gifts of more than “nominal value.” Although state statute fails to define “nominal value,” the Commission on Public Integrity issued an Advisory Opinion in 2008 that sought to provide parameters by explaining, for example, that absent an intent to influence, a cup of regular coffee or a soft drink would normally be considered something of nominal value, but a glass of beer or wine, or some other alcoholic beverage would be a gift with greater than nominal value.¹⁵ Of course, a further complication in using this analogy is that the Public Officers Law does not apply to municipal officers, only to state executive and legislative branch employees and to lobbyists.¹⁶

Although the Wind Code does not provide the Attorney General’s Office or the Task Force created under the Code with recourse against a municipal officer who accepts a prohibited gift from an employee of a wind company, exactly what constitutes a prohibited gift to government officials ought to be consistent among the various statutes, regulations and codes. Two possible reforms are appropriate here: the General Municipal

Law should be amended to make it consistent with the Public Officers Law (and it was before the 2007 amendment to the Public Officers Law); or, and perhaps more appropriate, there should be a zero tolerance for gifts whether or not of nominal value.¹⁷

C. Lobbying

Effective in April 2002, the New York State Legislative Law defines “lobbying” or “lobbying activities” at the local level as

any attempt to influence the passage or defeat of any local law, ordinance, resolution or regulation by any municipality or subdivision thereof or adoption or rejection of any rule, regulation, or resolution having the force and effect of local law, ordinance, resolution or regulation or any rate making proceeding by any municipality or subdivision thereof.¹⁸

Municipal lobbying covers

any jurisdictional subdivision of the State, including but not limited to counties, cities, towns, villages, improvement districts and special districts, with a population of more than fifty thousand; and industrial development agencies in jurisdictional subdivisions with a population of more than fifty thousand; and public authorities, and public corporations, but shall not include school districts.¹⁹

Individuals who meet the definition of lobbyist are required to register and file reports with the Commission on Public Integrity.²⁰

The Wind Code would also apply to situations that fit squarely under the definition of lobbying when wind company employees and paid advocates on their behalf seek to convince municipal officials to legislatively rezone property, and to adopt local laws, ordinances or resolutions allowing for and regulating the siting of wind turbines in the jurisdiction. The “General Standard” set forth in the Wind Code provides in part that wind companies may not directly or indirectly seek to confer benefits that would induce a municipal officer to act or refrain from acting in connection with their government responsibility with respect to wind farm development. Many, but not all, of the types of activities sought to be restrained under this section would also fit under the Legislative Law or lobbying requirements. The conduct in these sections regulates the actions of lobbyists and the private sector, not public sector officials. However, municipal officials need to be made more fully aware of what

state law and what the Attorney General would consider to be “improper relationships” between public and private sector interests. Training geared not just towards lobbyists and wind companies, but towards municipal officials would be a welcome “ounce of prevention.”

D. Employment Restrictions

State level executive and legislative branch employees are subject generally to post-employment restrictions which prohibit the former government employees from appearing before their former agency on any matter for which they are receiving compensation for a period of two years after leaving government service.²¹ A lifetime bar applies to former employees in relation to “any case, proceedings, application or transaction” that they personally participated in while at the agency.²² In 2006, the State Ethics Commission (now known as the Commission on Public Integrity) issued an opinion declaring that,

(1) State employees may not solicit a post-government employment opportunity with any entity or individual that has a specific pending matter before the State employee; and only may, 30 days from the time a matter is closed or the employee has no further involvement because of recusal or reassignment, solicit an employment opportunity; (2) State employees who receive an unsolicited employment-related communication from such an entity or individual (a) cannot pursue employment with the entity or individual or (b) must recuse themselves from the matter and any further official contact with the entity or individual and wait 30 days from such recusal before entering into post-government employment communications with the entity or individual; and (3) State employees must promptly notify their supervisors and ethics officers of such employment-related communications whether or not they intend to pursue the employment opportunity.²³

At the local government level, the restrictions are not quite so clear. For example, a provision in the General Municipal Law prohibits municipal officials from receiving compensation for services in relation to any matter before their own agency or before any agency where he or she has jurisdiction or appointment power,²⁴ but state statute is silent with respect to post-employment restrictions. It seems as though the Legislature thought this was a matter best left to individual municipalities to decide as local ethics laws

are required by statute to address, among other things, future employment.²⁵ However, if there is a general belief among stakeholders that post-employment restrictions for municipal officials is something that should be addressed uniformly across the State, this is another provision worthy of debate through the introduction of a legislative proposal to amend the General Municipal Law.

E. Education and Training

One of the major items missing in General Municipal Law Article 18, or any other state law, is the statutory requirement for ongoing training and education for municipal officials on ethics issues. Although the Attorney General has addressed this topic in the Wind Code, training requirements are limited to signatory wind companies and their employees. However, municipal officials are parties to the alleged questionable transactions, indicating that training could be beneficial for these decision makers as well. While clearly it would be inappropriate for the wind companies to provide ethics training to municipal officials, this is an opportunity for the Attorney General (as well as for the Department of State, the State Comptroller, and the municipal associations) to conduct statewide training on municipal ethics. Further, the Attorney General should consider strengthening the existing training requirement for wind companies. For example, in addition to posting and distribution mandates, the Wind Code provides that within 30 days of the announcement of the signing of the Code, the wind company is to conduct a seminar for employees about indentifying and preventing conflicts of interest when working with municipal officers. Employees must sign an acknowledgment certifying that they attended the training and that they have read and agree to abide by the Code (and failure to agree obligates the Company to discontinue their employment). The Code should be amended to provide that wind companies are required to provide at least annual training on these issues and that all new employees, within a certain number of days from initial hire, must complete the training (whether in person, on-line or in some other appropriate format). For a period of three years following agreement to abide by the Code, the Attorney General is requiring wind companies to contribute a proportional share of the reasonable administrative costs of the Task Force set up to provide oversight and monitor compliance. It would be a welcome addition to the Code if an amendment were made to allow for some of that funding to support a training initiative geared towards municipal officials.

F. Notification to Municipal Attorney

A curious provision in the Wind Code requires the wind company to notify the attorney for the municipality when it is discovered that a municipal

officer or his or her relative has entered into a lease with the company. In addition, the Wind Code directs the wind company to recommend to that municipal officer that he or she consult with the municipality's attorney concerning their legal obligations, including any obligation to recuse. This puts the municipal attorney in an awkward position. The municipal attorney works for the municipality as a whole, and not for individuals who may be involved in the wind siting decision-making process. For municipalities who need to watch the bottom line with respect to their outside counsel legal bills (since for many municipalities in the State, the municipal attorney is part-time and/or on retainer), the office charged with hiring the municipal attorney typically gets to prescribe the client(s) and subject matter that such attorney is retained to address (and hopefully this is explicitly set forth in a written retainer agreement or in a written job description). Since there may be no attorney-client relationship between the government lawyer and individual board members regarding their individual ethical conduct, municipal officials may be better advised to seek legal counsel outside of the municipally retained attorney. Further, a number of municipalities have boards of ethics established pursuant to the General Municipal Law, and these boards may be the more appropriate place to inquire about these types of actions. Lastly, some municipalities may have a designated ethics officer who would more likely be the point of initial contact. The Attorney General should consider as part of a comprehensive training program publishing a pamphlet for municipal officials that discusses when disclosure and recusal are required pursuant to statute.

IV. Conclusion

It is clear that given the tensions existing in communities between those who support the siting of wind turbines and those who oppose them, all of the participants would be wise to ensure that their conduct is absolutely beyond reproach as they are likely to be watched very closely and challenged where conduct is questionable. Based upon annual surveys of ethics in land use, it is evident that there are a healthy number of cases reported each year where unhappy community members lodge allegations of unethical conduct on the part of municipal officials in an effort to void unfavorable decisions.²⁶ Although most of these fail because either the complainant did not have sufficient evidence to prove the allegation or because the complained-of action, while perhaps not appropriate, technically did not violate a law,²⁷ the bottom line is that allegations of unethical conduct in this arena have a negative ripple effect. The Internet and blogs have become a popular and cost-effective method of communication between individuals and community groups across the country opposed, in this case, to the siting of wind turbines. Postings related to ethics allegations in one jurisdic-

tion will trigger closer scrutiny of these issues in other communities where proposals are making their way through the review process.

Full disclosure and transparency in government decision making is critical to ensuring public integrity and trust in government. Officials at all levels of government must disclose and recuse themselves from decision-making roles when personal financial conflicts of interest arise. Many of the alleged activities that have occurred emanating from efforts to site wind turbines are clearly illegal or unethical under existing statutory and regulatory frameworks. Informal opinions issued by previous Attorneys General have even suggested that specific provisions of the General Municipal Law need not be violated in order to find an improper conflict of interest.²⁸ The fact that there have been numerous alleged instances of abuse in different jurisdictions over a relatively short span of time clearly indicates that this issue requires immediate attention. To that end, the Attorney General's action to shed sunlight on inappropriate conduct and to develop a document to guide future actions is a welcome effort. What is needed now is a more holistic approach involving the full spectrum of stakeholders to both reinforce and to strengthen the direction charted by the Attorney General. This includes a re-examination of state and local lobbying laws and regulations as well as municipal ethics requirements. It is critical that all stakeholders participate and that action is swift so that this issue can be appropriately addressed without slowing the progress on harnessing clean, renewable energy in New York. One concluding thought: This is not just a New York issue; what the Attorney General does in New York has great potential for ripple effects in other states who often replicate models developed in New York.

Endnotes

1. See, e.g., provisions in the Town Law, Village Law, General City Law, County Law, Alternative County Law, Election Law, General Municipal Law, Labor Law, Judiciary Law, the Real Property Tax Law and the Second Class Cities Law as set forth in a chart in, Mark Davies "Non-Article 18 Conflicts of Interest Restrictions Governing Counties, Cities, Towns and Villages Under New York State Law," *Municipal Lawyer*, Vol. 20, No. 1 at 5 (Winter 2006).
2. N.Y. Gen. Mun. L. § 806.
3. See Mark Davies, "Ethics Laws for Municipal Officials Outside of New York City," 1 *Government Law & Policy Journal* at 44 (New York State Bar Association, 1999). Davies explains that sadly, there is no single, uniform and comprehensive code of ethics for municipal officials in New York. See also Mark Davies, "Enacting a Local Ethics Law—Part I: Code of Ethics," *Municipal Lawyer*, Vol. 21, No. 3 at 4 (Summer 2007); "Enacting a Local Ethics Law—Part II: Disclosure," *Municipal Lawyer*, Vol. 21, No. 4 at 8 (Fall 2007); "Enacting a Local Ethics Law—Part III: Administration," *Municipal Lawyer*, Vol. 22, No. 1 at 11 (Winter 2008); "Local Ethics Laws: Model Administrative Provisions," *Municipal Lawyer*, Vol. 22, No. 3 at 14 (Summer 2008).
4. http://www.nytimes.com/2008/08/18/nyregion/18windmills.html?_r=3&oref=slogin&oref=slogin (site visited January 2009).
5. For example, a town supervisor cast the deciding vote allowing private land to be condemned for purposes of siting a wind farm after acknowledging that he had accepted real estate commissions on at least one land deal involving the farm's developer. In another municipality, according to local residents, a town official took a job with a wind company after involvement with the passage of a zoning law relating to wind turbines. In another town, the supervisor reported that after a meeting during which he proposed a moratorium on wind towers, he had been invited to pick up a gift from the back seat of a wind company representative's car.
6. http://www.nytimes.com/2008/08/18/nyregion/18windmills.html?_r=3&oref=slogin&oref=slogin (site visited January 2009).
7. <http://lawoftheland.wordpress.com/2008/07/17/ny-attorney-general-launches-investigation-of-potential-unethical-and-illegal-dealings-between-wind-power-companies-and-municipalities> (site visited January 2009).
8. *Hedman v. Town Board of Town of Howard*, 867 N.Y.S.2d 634 (4th Dep't 2008).
9. <http://www.newsday.com/news/local/wire/newyork/ny-bc-ny--windpower-turbule1123nov23,0,3062001.story>.
10. http://www.oag.state.ny.us/media_center/2008/oct/WindCODE%20FINAL.pdf (site visited January 2009).
11. *Id.*
12. *Id.*
13. For example, General Municipal Law § 806 provides that among other things, locally adopted codes of ethics must address: standards with respect to the disclosure of interest in legislation before the governing body; standards with regard to the holding of investments in conflict with official duties; private employment and conflict with official duties; and future employment.
14. N.Y. Gen. Mun. L. § 809(2)(d).
15. New York State Commission on Public Integrity, Advisory Opinion 08-01, available at: http://www.nyintegrity.org/advisory/cpi/2008/Advisory_Opinion_08-01.pdf (site visited January 2009).
16. N.Y. Exec. L. § 94(1).
17. This view is counter to some that believe an absolute prohibition could also produce absurd results in certain situations, and that although there may be an assumption that every gift, no matter how insignificant, has some potential to influence public employees, the challenge "is to distinguish those where the potential is sufficiently significant so as to prohibit them." See Richard Rifkin, "Gift Giving in the Public Sector," in *ETHICAL STANDARDS IN THE PUBLIC SECTOR*, 2nd ed. (P. Salkin, ed.) (American Bar Association, 2008). New York City's rule on lobbyist gifts offers a possible middle ground. New York City prohibits all gifts by lobbyists to New York City public servants (NYC Ad. Code § 3-225; 53 RCNY § 1-16(a)), but then exempts, *inter alia*, "de minimis promotional items having no substantial resale value such as pens, mugs, calendars, hats, and t-shirts which bear an organization's name, logo, or message in a manner which promotes the organization's cause" (53 RCNY § 1-16(c)(1)). See http://www.nyc.gov/html/conflicts/downloads/pdf2/rules_1_07_final.pdf (site visited January 2009).
18. http://www.nyintegrity.org/local/local_lobbying.html (site visited January 2009).
19. *Id.* For a list of covered municipalities see <http://www.nyintegrity.org/pubs/LocalFacts.PDF> (site visited January 2009).

20. The registration and reporting requirements are beyond the scope of this article, but New York Legislative Law Art. 1-A may be accessed at: <http://www.nyintegrity.org/law/lob/lobbying2.html>; and Guidelines adopted by the Commission on Public Integrity are available at: <http://www.nyintegrity.org/law/lob/guidelines.html> (site visited January 2009).
21. N.Y. Pub. Off. L. § 73(8)(a)(i).
22. N.Y. Pub. Off. L. § 73(8)(a)(ii).
23. N.Y.S. Ethics Commission, Advisory Opinion 06-01 (Jan. 23, 2006). The opinion may be accessed at: <http://www.nyintegrity.org/advisory/ethc/06-01.htm> (site visited January 2009).
24. N.Y. Gen. Mun. L. § 805-a[1][c].
25. N.Y. Gen. Mun. L. § 806[1][a].
26. See, generally, P. Salkin, "Ethics in Land Use," Ch. 38 in *AMERICAN LAW OF ZONING*, 5th Ed. (Thomson-West 2008).
27. *Id.*
28. See Inf. Op. N.Y. Att'y Gen. 97-5; Inf. Op. N.Y. Att'y Gen. 86-54.

Patricia E. Salkin is the Raymond & Ella Smith Distinguished Professor of Law at Albany Law School where she also serves as Associate Dean and Director of the Government Law Center. She is the author of the blog, Law of the Land, <http://lawoftheland.albanylaw.edu>.

CODE OF CONDUCT FOR WIND FARM DEVELOPMENT

The below-signed Wind Company voluntarily agrees to implement the following Code of Conduct to govern its future conduct in connection with Wind Farm Development in New York State.

I. CONFLICTS OF INTEREST - PROHIBITED

1. **General Standard:** The Wind Company shall not directly or indirectly offer to, or confer on, a Municipal Officer, his or her Relative, or any third party on behalf of such Municipal Officer any benefit under circumstances in which it could reasonably be inferred the benefit would induce such Municipal Officer to commit an official act or to refrain from performing an official duty in connection with Wind Farm Development, unless such Municipal Officer recuses him or herself from any official duties in connection with Wind Farm Development.
2. **No Gifts:** The Wind Company shall not give any Municipal Officer, his or her Relative, or any third party on behalf of such Municipal Officer, any gift or gifts totaling more than ten dollars (\$10.00) in the aggregate during any one-year period.
3. **No Compensation for Services:** The Wind Company shall not employ, hire, retain or compensate, or agree to employ, hire, retain or compensate, any Municipal Officer whose official duties involve Wind Farm Development in connection with the Wind Company, or his or her Relative, within two years of the time that such Municipal Officer had such duties, unless such Municipal Officer first recuses him or herself from any official conduct in connection with such Wind Farm Development. Accordingly, any compensation provided by the Wind Company to such Municipal Officer, his or her Relative, or third party on behalf of such Municipal Officer or Relative, shall be contingent on such prior recusal. The Wind Company shall disclose in writing to the Task Force and the Office of the Attorney General any agreement that is contingent on such recusal.
4. **No Contingent Compensation:** The Wind Company shall not provide or agree to provide compensation to any Municipal Officer or his or her Relative that is contingent upon such Municipal Officer's action before or as a member of any Municipal agency.
5. **No Honorarium:** The Wind Company shall not confer on any Municipal Officer or his or her Relative any honorarium during the Municipal Officer's public service, or for a period of two years after termination of such Municipal Officer's service.
6. **Restrictions on Easements/Leases with Municipal Officers:** The Wind Company shall not enter into any agreement with any Municipal Officer that requires the Municipal Officer to support or cooperate with Wind Farm Development in any manner that relates to the Municipal Officer's official duties.
7. **Confidential Information:** The Wind Company shall not solicit, use, or knowingly receive confidential information acquired by a Municipal Officer in the course of his or her official duties.
8. **Restrictions on Legal Representation:** The Wind Company shall not agree to pay legal fees for any Municipal Officer or Municipality in connection with any investigation by any law enforcement agency.

II. PUBLIC DISCLOSURE

For events transpiring after the date that this Code of Conduct is signed, the Wind Company shall make the disclosures as set forth in this section. For any financial interest held by a Municipal Officer or his or her Relative in any property Identified for Wind Farm Development prior to the date of this Code of Conduct, the Wind Company shall make the disclosure of the Municipal Officer and the nature and scope of the financial interest by a chart submitted to the Office of the Attorney General and displayed on a website hosted by the Wind Company. The format of the chart shall be subject to the approval of the Office of the Attorney General.

1. The Wind Company shall publicly disclose the full names of any Municipal Officer or his or her Relative who has a financial interest in any property Identified for Wind Farm Development, and the nature and scope of the financial interest in the following manner:
 - a. Submit the information in writing for public inspection to the Clerk of such Municipality.
 - b. Publish the information in a newspaper having a general circulation in such Municipality.
 - c. Display the information on a website hosted by the Wind Company.
 - d. Submit the information in writing to the Task Force and the Office of the Attorney General.
2. All Wind easements and leases shall be in writing. The Wind Company shall promptly file, duly record, and index an abstract or memorandum of such agreements in the Office of the County Clerk for the county in which the subject property is located; if property owner is a Municipal Officer or his or her Relative, then the Wind Company also shall post an abstract or memorandum of any such agreement on a website hosted by the Wind Company.
3. The abstract or memorandum of such agreements shall, at a minimum, include:
 - a. the full names and addresses of the parties;
 - b. a full description of the property subject to the agreement;
 - c. the essential terms of the agreement, including the rights conveyed by the property owner and, if the property owner is a Municipal Officer or his or her Relative, which of the following ranges encompasses the actual monetary consideration offered by the Wind Company or, if the actual monetary consideration is not fixed, the Wind Company's estimate of the monetary consideration:
 - i. Under \$5,000
 - ii. \$5,000 to under \$20,000
 - iii. \$20,000 to under \$60,000
 - iv. \$60,000 to under \$100,000
 - v. \$100,000 to under \$250,000
 - vi. \$250,000 to under \$500,000
 - vii. \$500,000 to under \$1,000,000
 - viii. \$1,000,000 or higher.

III. EDUCATION AND TRAINING

1. The Wind Company shall promptly provide a copy of this Code of Conduct and a written statement of its intention to comply with this Code of Conduct to the government of any Municipality in which it engages in Wind Farm Development.
2. Within one week of the announcement of this Code of Conduct, the Wind Company shall publish this Code of Conduct on a website hosted by the Company and on any internal computer network (intranet) site that can be accessed only by its officers or employees, distribute copies of this Code of Conduct among its officers and employees, and post copies in its main office and at any local Wind Farm Development office.

3. Within thirty days of the announcement of this Code of Conduct, the Wind Company shall conduct a seminar for all officers and employees, except those who perform solely administrative/clerical, accounting, or building maintenance functions, about identifying and preventing conflicts of interest when working with Municipal Officers.
4. Within thirty days of the seminar, the Wind Company shall obtain acknowledgement forms from each of its employees, certifying that they have: (i) attended the seminar required by paragraph 3 of this section, unless they fall into the exception therein, and (ii) have read and agree to comply with this Code of Conduct. If, due to exceptional circumstances, an officer or employee is unable to attend the seminar required in paragraph 3 of this section, alternative arrangements should be made as soon as is practical for such officer or employee to receive the training described in paragraph 3 and sign the acknowledgement form. The Wind Company shall discontinue employment of anyone who fails to attend the seminar, or its equivalent, or sign the acknowledgment form.
5. The Wind Company shall distribute to all its employees and post prominently in all its work locations as well as on its website or intranet system the NYS Attorney General's Public Integrity Hotline with instructions that any misconduct, violation of the law, or corruption of any sort in connection with Wind Farm Development; or any violation of this Code of Conduct shall be promptly reported to the New York State Attorney General.
6. Upon discovery by the Wind Company that a Municipal Officer or his or her Relative has entered into a lease or easement with the Wind Company, the Wind Company shall (i) notify the attorney for the Municipality and (ii) recommend to such Municipal Officer that he or she consult with the Municipality's attorney concerning his or her legal obligations, including any obligation to recuse him or herself.

IV. ENFORCEMENT AND COMPLIANCE

1. The Office of the New York State Attorney General shall establish the above-referenced Task Force to provide oversight of Wind Farm Development and monitor compliance with this Code. The Task Force shall include, among others, local elected officials, including District Attorneys, and others designated by the Office of the Attorney General. The Task Force shall report only to the Office of the New York State Attorney General. The Office of the New York State Attorney General shall establish responsibilities and guidelines for the Task Force.
2. For three years following the Wind Company's agreement to this Code of Conduct or until the Wind Company ceases operations in New York State, whichever is earlier, the Wind Company shall contribute a proportional share of the reasonable administrative costs of the Task Force, in an amount to be determined by the Task Force. So long as the Wind Company operates in New York State, it shall fully cooperate with the Task Force.
3. Should the Wind Company discover any conduct in violation of the provisions of this Code, the Wind Company shall promptly disclose such information to the Office of the New York State Attorney General. The Wind Company shall fully cooperate with the Office of the New York State Attorney General in any investigation arising out of such violation.
4. The Task Force shall give notice of any complaints relating to the Wind Company to the Office of the New York State Attorney General. The Task Force may decide not to refer such a complaint, if it determines that it involves a matter relating to this Code of Conduct that can be resolved by the Task Force. The Task Force may refer such complaints to the Office of the New York State Attorney General. With respect to any complaint referred to the Office of the New York State Attorney General by the Task Force, the Office of the New York State Attorney General shall advise the Wind Company of the complaint and give the Wind Company a reasonable opportunity to obtain and submit to the Office of the New York State Attorney General information relevant to the complaint. After providing such opportunity, the Office of the New York State Attorney General shall determine, in its reasonable discretion, and based on a reasonably comprehensive factual investigation including any information provided by the Wind Company, whether a preponderance of the evidence establishes that the Wind Company has violated this Code of Conduct in any material respect. In the event that a violation of any provision set forth in this Code is found, the Wind Company shall pay a civil penalty of up to \$50,000 for the first violation, and up to \$100,000 for any subsequent violation. In setting any penalty amount, the Office of the New York State Attorney General shall consider the relative severity of, and the relative harm to public integrity

occasioned by, the violation. Any payment shall be made by certified check made payable to the “State of New York.” The Wind Company shall have the right to challenge the Office’s finding of a violation and determination of penalty amount before a court of competent jurisdiction, but shall pay any assessed penalty to the State of New York pending the resolution of any such court challenge.

5. The Wind Company and the Office of the New York State Attorney General shall meet to review the terms of this Code both four months and one year from the date on which this Code is signed.

V. DEFINITIONS

Unless otherwise stated or unless the context otherwise requires, when used in this Code:

1. “Gift” means any thing having more than a nominal value whether in the form of money, service, loan, investment, travel, entertainment, hospitality, or in any other form and includes an offer to a charitable organization at the designation of the Municipal Officer or at the designation of his or her Relative.
2. “Honorarium” means any payment made in consideration for any speech given at a public or private conference, convention, meeting, social event, meal or like gathering.
3. “Identified” means that the Wind Company has begun to pursue the purchase or lease of, or an easement on, real property in which the Wind Company knows, or through the exercise of reasonable diligence should have known, that a Municipal Official or his or her Relative has a financial interest in the property.
4. “Municipality” means a county, city, town, village, public authority, school district, or any other special or improvement district, but shall have no application to a city having a population of one million or more or to a county, school district, or other public agency or facility therein.
5. “Municipal Officer” means any officer or employee of a municipality, whether paid or unpaid, and includes, without limitation, all members of any office, board, body, advisory board, council, commission, agency, department, district, administration, division, bureau, or committee of the municipality. It also includes any entity that is directly or indirectly controlled by, or is under common control with, such officer or employee.
 - a. “Municipal Officer” shall not include:
 - i. A judge, justice, officer, or employee of the unified court system;
 - ii. A volunteer firefighter or civil defense volunteer, except a fire chief or assistant fire chief; or
 - iii. A member of an advisory board of the municipality if, but only if, the advisory board has no authority to implement its recommendations or to act on behalf of the municipality or to restrict the authority of the municipality to act.
6. “Relative” means a spouse, domestic partner, child, step-child, sibling, or parent of the Municipal Officer, or a person claimed as a dependent on the Municipal Officer’s latest individual state income tax return.
7. “Wind Farm Development” means any stage of past, present or future development or siting of wind farms, wind turbines, wind power and related facilities or wind power projects; whether considered planned, attempted or completed, including but not limited to permitting, licensing, construction and energy production.

[Note: Part VI containing Forms to be used has been omitted]