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**Siting Wind Farms in New York: Applicability of  
the Relaxed Public Utility Standard**

July/August 2006



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*Patricia E. Salkin and Robert Burgdorf*

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# NEW YORK ZONING LAW AND PRACTICE REPORT



July/August 2006

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## Editor-in-Chief

Patricia E. Salkin, Esq.

## Managing Editor

William D. Bremer, Esq.

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## SITING WIND FARMS IN NEW YORK: APPLICABILITY OF THE RELAXED PUBLIC UTILITY STANDARD

Patricia E. Salkin and Robert Burgdorf

*The September/October 2006 issue of New York Zoning Law and Practice Report continues to attract considerable attention as the interest in the siting of wind farms in New York continues to increase in visibility.<sup>1</sup> In June 2006, a major statewide conference on the siting of wind farms was held at Albany Law School, bringing together stakeholders including those involved with developing the energy technology, people working to develop the sites for the wind farms, and local government officials and citizens, both those who favored the use of wind farms and those who had concerns over various environmental aspects associated with the siting of turbines. Representatives from State agencies, including the New York State Energy and Research Development Authority, the Department of Environmental Conservation, the Department of State and the Department of Agriculture & Markets participated in the program, reinforcing a message that New York State government supports green energy and generally favors the concept of encouraging local communities, where appropriate, to consider siting wind farms. Many issues were addressed at the conference, which featured a panel of scientists and*

Patricia E. Salkin is Associate Dean and Director of the Government Law Center of Albany Law School.

Robert W. Burgdorf is a partner with Nixon Peabody LLP in Rochester, New York. His practice concentrates on all aspects of real estate law, with primary concentration in zoning and real estate development approvals, and real estate related litigation. He has also been involved with the development of over 1,100 cellular telephone tower sites throughout New York State over the last 17 years, and helped create law that such facilities are to be deemed "public utilities" for purposes of obtaining New York's relaxed public utility zoning standard.

*engineers discussing the science and technology behind wind power (including an explanation of the wind resource, the electric grid and other siting factors); government policies, programs and initiatives in support of green development; legal considerations in the siting of wind farms (including land use planning, zoning, agricultural issues and environmental issues); and the experiences of local officials to date with financing techniques and revenue opportunities. This article highlights one of the issues discussed at the conference – whether the courts will apply the relaxed public utility standard to wind farms.*

## Background

With four wind farms in operation in New York and 20 more in various stages of development, the legal battlefield is likely to heat up between those who favor the siting of wind turbines in communities across the State, and those who are concerned with aesthetics, noise, flickering and other environmental issues that have been associated, in varying degrees, with the turbines. Newspapers across the State are reporting on the wind energy phenomenon. At one end of the spectrum are those who see the potential for wind energy not only to reduce the country's dependence on foreign oil, but who also see it as a emission-free form of clean energy that will help with efforts to slow the effects of global warming and climate change. At the other end of the spectrum are environmentalists who subscribe to the same clean energy goals but who don't necessarily see wind farms as the answer. This group raises other environmental concerns such as impacts associated with respect to viewsheds, community character, and potential health effects associated with shadow flickering and noise.

In March 2006 lawsuits were filed against the towns of Clinton and Ellenburg over the siting of wind farms,<sup>2</sup> and in May 2006 a lawsuit was initiated against the Town of Cohocton over its wind mill local law.<sup>3</sup> In June 2006 residents in Hornby attended a public hearing on a proposed local law to allow for the construction of a large wind farm.<sup>4</sup> Reportedly, this hearing was friendlier towards the wind farms than the mood last August, and some speaking in favor of the local law fo-

cused on the economic opportunities for the municipality.<sup>5</sup> Also in June, one wind developer held a job a fair in the North Country to fill two to three dozen jobs – 400 people showed up to apply.<sup>6</sup> Public hearings were recently held in Saratoga County in the Town of Greenfield<sup>7</sup> and in more than a dozen local communities throughout Upstate, New York. Last month, the Southern Tier West Regional Planning Board launched a statewide wind energy initiative designed to enable the State's regional planning councils to better provide wind energy assistance services to municipal boards, municipal planning/zoning boards, county elected officials, county planning boards, industrial development agencies, code enforcement officers, and county and municipal staff.<sup>8</sup>

While the foregoing simply scratches the surface of illustrating the current level of activity with respect to the siting of wind farms, the remainder of this article picks up where the September/October issue of *New York Zoning Law and Practice Report* left off and focuses specifically on application of the relaxed public utility zoning standard to wind turbines.

## Public Utility Facilities Generally

The importance of providing public utility services has led to a body of case law in New York over the last half century which makes it improper for a municipality to prevent or unreasonably interfere with the deployment of these essential services. As a result, municipal zoning authority to regulate the location, expansion and operation of public utility uses is different than its general zoning authority.<sup>9</sup>

The special treatment of a public utility transmitting facility stems from both the essential nature of its service, and the need for a public utility transmitting facility to be located in a particular spot in order to produce or provide the service. For instance, water tanks, overhead power lines, cellular telephone towers, electric substations, water pumping stations, power generation facilities, and telephone poles must be in a particular location or elevation – often in or through residential districts, and often in highly visible areas – in order to provide the utility. Power generation facilities often must be near certain natural resources – rivers for hydropower or pockets of natural gas deposits, for example.

As pointed out in the main text of the *New York Zoning Law and Practice*, 4th treatise, "The general rules...have been modified to fit the unique features of public utility uses, and to permit the expansion of essential services consistent with comprehensive plans for community development, and community health . . . [M]ost utilities have logistic problems that are not identified with those of other companies which supply goods or services. The product of the utility must be

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piped, wired or otherwise served to each user. And the supply must be maintained at a constant level to meet minute-by-minute demand. The user has no alternative source; the supplier commonly has no alternative means of delivery.<sup>10</sup> A municipality may regulate, but may not prohibit, the installation of lines for the transmission of electricity.<sup>11</sup>

Accordingly, while a municipality may provide some reasonable regulation and impose reasonable mitigation measures, the law in New York is that it may not prohibit or have the effect of prohibiting facilities necessary for the provision of a public utility service.<sup>12</sup> A public utility may not be excluded from a residential district where it is essential for the provision of adequate service.<sup>13</sup> A municipal corporation may not prohibit the expansion of a public utility where such expansion is necessary for the provision of essential services.<sup>14</sup>

In short, due to the essential nature of the service and the limited flexibility there is as to where the facility can be located in order to generate or provide the service, the facility must be, and is, entitled to a relaxed zoning standard. The company providing the public utility service must demonstrate that the proposed location is necessary to render safe and adequate service and that no alternate sites are reasonably available that could be used with less disruption to the community's zoning plan.<sup>15</sup> However, not all facilities associated with a public utility service can take advantage of the relaxed standard. The public utility's garage or business offices, for example, would not enjoy this relaxed standard because their location is not important for the provision of the service.

Once the company has shown the need for the proposed location and shown that it is the least intrusive reasonable alternative, the municipality may reasonably regulate, but may not prohibit, the facility. This is true even if the facility will impose inconvenience and some loss of value on the lands adjacent to it. An essential service may not be denied simply to preserve the zoning scheme,<sup>16</sup> to protect certain neighbors from alleged loss of value,<sup>17</sup> or to assuage community opposition.<sup>18</sup>

In exercising "reasonable regulation," such regulation will be deemed unreasonable if the municipality uses it to exclude *de facto* such a public utility facility by confining it to an unreasonably small area, or an area that defeats the purpose of the facility, or by imposing conditions that render the facility unable to reasonably effectuate its purpose and provide the service.

The Court of Appeals has attempted to define a need-based test for the unique circumstances of public utilities.

[T]he utility must show that modification is a public necessity in that it is required to render safe and adequate service, and that there are compelling reasons, economic or otherwise, which make it more feasible to modify the plant than to use alternative sources of power such as may be provided by other facilities. However, where the intrusion or burden on the community is minimal, the showing required by the utility should be correspondingly reduced.<sup>19</sup>

The Court later applied this test to entirely new sitings of facilities, as well as the modification of existing facilities.<sup>20</sup>

## Application of the Relaxed Public Utility Zoning Standard to Wind Turbine Generators

Wind energy is fast becoming a significant part of this nation's diversified energy portfolio, as the nation seeks to reduce its reliance on foreign sources of energy and prepares for an ever-dwindling supply and increasing cost of traditional fossil fuels. Technological advances in the last 20 years, combined with higher prices for traditional fossil fuels, have made electricity from wind competitive with traditional sources of energy such as gas, oil, and coal. Wind has the added advantage of being non-polluting, helping to alleviate greenhouse gases and global warming.<sup>21</sup>

The growth in wind farms is in furtherance of the federal government's policy as articulated in 42 U.S.C.A. § 9201 to "assist private industry, other entities, and the general public in hastening the widespread utilization of [wind energy] systems,"<sup>22</sup> as well as the State of New York's stated renewable energy policy, which requires 25 percent of the State's energy to come from renewable sources such as wind by the year 2013.<sup>23</sup>

While providing electricity from wind on a large scale is relatively new in the United States,<sup>24</sup> providing electricity has long been considered a core essential service, and entitled to the relaxed public utility standard.<sup>25</sup> The question is whether there is any reason to treat wind turbine generators differently, just because using wind to generate electricity is different from the usual sources of large scale electricity production. As discussed below, there does not appear to be any reason to treat wind turbines differently, as wind turbines meet the elements of the applicable test and should be deemed the functional equivalent of other electric generating facilities.

The first prong – whether electricity is an essential service – is well settled.<sup>26</sup> Given that electricity is an essential service, the inquiry primarily focuses on whether proposed wind turbines reasonably need to be where proposed in order to provide the service, or whether the wind turbines can be placed in a less intrusive location and still function effectively and economically.

Numerous factors must be considered and evaluated in siting a wind energy project. The primary prerequisite is the existence of a sufficiently strong (minimum Class 4) wind resource (at least 7.00 meters per second on average, annually).<sup>27</sup> This is a fairly unique resource, and only a small percentage of ridge tops in New York will satisfy this and the other prerequisite conditions.<sup>28</sup> The energy production from a wind turbine increases exponentially as the wind resource exceeds this minimum amount, and higher wind resources provide even greater levels of electricity and efficiency, a value to both the public and the developer. Among other critical issues, the wind farm must also be located in relatively close proximity to an appropriately sized transmission line in order to supply the electricity into the power grid, where it can then be used by the public.

Wind turbines must be located where the wind resource is in order to utilize the resource. Location and

the hub height of the wind turbines is extremely sensitive to the productivity and efficiency of the wind turbine. If a municipality were to be able to prevent the wind farm from being where the appropriate wind resource is located, it would be in a position to prevent this essential service from being provided, and local municipalities would be in a position to squander this important natural resource to the detriment of the greater public.

### Common Issues with Cell Towers and Wind Turbines and the Rosenberg Test

Treatment of wind farms as public utilities is analogous to the courts' treatment of cell towers as public utility facilities over the last 15 years. Both cell towers and wind turbines must be in a particular location, and built to a particular height, in order to effectively function and provide their essential services – wireless telephone service in the case of cell towers; electricity in the case of wind turbines.

In 1993, the New York Court of Appeals in *Cellular Telephone v. Rosenberg* applied the relaxed public utility standard to cellular telephone facilities. The court reasoned that wireless telephone service was analogous to other traditional essential services, such as land line telephone service and electric and natural gas providers, and that the cellular telephone company's demonstration that the facility's location was necessary in order to provide service was sufficient to warrant the granting of any zoning approvals under the public utility standard.<sup>29</sup>

The *Rosenberg* Court identified three characteristics of a "public utility" for purposes of the relaxed zoning standard. Those characteristics were: (1) provision of an essential service, (2) operation under a franchise, subject to some measure of public regulation, (3) logistical issues related to the delivery of the service necessitating a constant supply and means of delivery (i.e., pipes, wires, transmission lines).

In the case of wind turbines, the first prong is satisfied as provision of electricity has long been held to be an essential service.<sup>30</sup>

The second prong requiring "public regulation" is also satisfied. Most wind turbine projects are defined and treated as a "public utility" under the Federal Power Act ("FPA"), 16 U.S.C.S. §§ 824(c), 824(d) and, as such, subject to rate and related regulation under the FPA, as well as other governmental regulations.<sup>31</sup>

The third prong is also satisfied because, as noted earlier, wind turbines must be in a particular location and located at a particular height in order to access sufficient wind resources from the fairly uncommon and unique places where such wind resources can be found.

Wind turbines face some of the same primary obstacles as cellular towers – namely, the need to be in a particular location and built to a sufficient height – both of which are necessary to enable them to effectively provide their essential service. The Court of Appeals clarified the scope of what is considered a public utility in the *Rosenberg* case, and applying the same test, and the same reasoning, it appears likely that New York courts would be compelled to deem wind turbines to also be considered public utilities for purposes of zoning.

### Conclusion

Large scale provision of electricity using wind turbines is relatively new in the United States. However, the core factors present with wind farms which necessitate applying New York's relaxed public utility zoning standard are not new, namely: provision of a traditional essential service (electricity); and limited flexibility regarding where the facility can be placed and still provide the service. Also, wind farms are subject to some degree of "public regulation." The prerequisites for applying the traditional public utility standard are met, and, as noted above, are made even more compelling given the important public policy concerns.

### NOTES

1. Patricia E. Salkin and Michael Donohue, "Planning & Zoning for Wind Power in New York," *New York Zoning Law and Practice Report*, Vol. 6, No. 2 (September/October 2006). This article offers a survey of planning and zoning techniques for the siting of wind farms and raises the related environmental review issues.
2. See, Suzanne Moore, "Lawsuits challenge wind-energy laws in Clinton, Ellenburg," *Press Republican* (March 16, 2006).
3. Michelle King, "Wind Farm Development Lawsuits Directed at Town of Cohocton," *Hornell Evening Tribune* (June 30, 2006) available at: <http://www.eveningtribune.com/articles/2006/06/30/news/news03.txt> (site visited July 2006).
4. Jeffrey Smith, "Residents Weigh in on Wind Farms," *Corning Leader* (June 8, 2006) available at: [http://www.theleader.com/articles/2006/06/08/local\\_news/local02.txt](http://www.theleader.com/articles/2006/06/08/local_news/local02.txt) (site visited July 2006).
5. *Id.* For example, according to Noble Wind Energy, which currently has three projects under review in New York, if completed, these projects will generate 285 megawatts of power. "The company claims 728 construction jobs and 39 permanent operational jobs would be created by the three wind farms, which would have an economic impact of \$360 million over 20 years." See, Larry Rulison, "These Blades Are in it for the Long Haul," *Times Union* (June 13, 2006) available at: <http://timesunion.com/AspStories/story.asp?storyID=491021&category=BUSINESS&BCCode=HOME&newsdate=6/13/2006> (site visited July 2006).
6. "Wind Power Gaining Momentum in the North Country," *Press Republican* (June 27, 2006), available at: <http://www.pressrepublican.com/apps/pbcs.dll/article?AID=/20060627/OPINION/606270310> (site visited July 2006).
7. "Hearing Tonight on Wind Tower," *Saratogian* (June 8, 2006). See, [http://www.saratogian.com/site/news.cfm?newsid=16755472&BRD=1169&PAG=461&dept\\_id=17708&rfti=6](http://www.saratogian.com/site/news.cfm?newsid=16755472&BRD=1169&PAG=461&dept_id=17708&rfti=6) (site visited July 2006).
8. See, <http://www.southerntierwest.org/wind%20energy/wind%20energy.htm> (site visited July 2006).
9. See, e.g., *Consolidated Edison Co. of New York, Inc. v. Hoffman*, 43 N.Y.2d 598, 611, 403 N.Y.S.2d 193, 374 N.E.2d 105 (1978); *Payne v. Taylor*, 178 A.D.2d 979, 578 N.Y.S.2d 327 (4th Dep't 1991); *Cellular Telephone Co. v. Meyer*, 200

- A.D.2d 743, 607 N.Y.S.2d 81 (2d Dep't 1994); *Mammia v. Zoning Bd. of Appeals of Town of Cortlandt*, 110 Misc. 2d 534, 442 N.Y.S.2d 689, 691 (Sup 1981); *Consolidated Edison Co. of N.Y. v. Village of Briarcliff Manor*, 208 Misc. 295, 144 N.Y.S.2d 379 (Sup 1955); *Long Island Lighting Co. v. Village of Old Brookville*, 72 N.Y.S.2d 718 (Sup 1947). See generally, "Zoning and the Expanding Public Utility," 13 Syracuse L. Rev. 581 (1962).
10. Salkin, *New York Zoning Law and Practice*, 4th § 11:18.
  11. Salkin, *New York Zoning Law and Practice*, 4th § 11:19.
  12. Salkin, *New York Zoning Law and Practice*, 4th §§ 11:18 to 11:23.
  13. Salkin, *New York Zoning Law and Practice*, 4th § 11:18; *Village of Briarcliff Manor*, 208 Misc. 295.
  14. *Long Island Lighting Co. v. Griffin*, 272 A.D. 551, 74 N.Y.S.2d 348 (2d Dep't 1947).
  15. Cf. *U.S. Transmission Systems, Inc. v. Schoepflin*, 63 A.D.2d 970, 405 N.Y.S.2d 764 (2d Dep't 1978); *Niagara Mohawk Power Corp. v. City of Fulton*, 8 A.D.2d 523, 188 N.Y.S.2d 717 (4th Dep't 1959).
  16. *Northport Water Works Co. v. Carll*, 133 N.Y.S.2d 859 (Sup. Ct. 1954).
  17. *Northport Water Works Co.*, 133 N.Y.S.2d 859.
  18. *Cellular Telephone Co. v. Village of Tarrytown*, 209 A.D.2d 57, 624 N.Y.S.2d 170 (2d Dep't 1995).
  19. *Consolidated Edison Co.*, 43 N.Y.2d 598, 611.
  20. *Cellular Telephone Co. v. Rosenberg*, 82 N.Y.2d 364, 372, 604 N.Y.S.2d 895, 624 N.E.2d 990 (1993).
  21. See U.S. Department of Energy's Energy Information Administration – Annual Energy Review, available at <http://www.eia.doe.gov/aer> (site visited July 2006); see also American Wind Energy Association – Comparative Air Emissions of Wind and Other Fuels, available at <http://www.awea.org/pubs/factsheets/EmissionKB.pdf> (site visited July 2006).
  22. 42 U.S.C.A. § 9201 (2006).
  23. Press Release, State of New York Public Service Commission, "PSC Votes to Adopt Aggressive Renewable Energy Policy for New York State" (Sept. 22, 2004).
  24. The wind has been an important source of energy in the U.S. for a long time. The mechanical windmill was a "high-technology" invention of the late 1800's that allowed much of the western frontier of the United States to be developed. Over 8 million mechanical windmills have been installed in the U.S. since the 1860's, and some of these units have been in operation for more than a hundred years. In the 1920's and 1930's, before the Rural Electrification Agency began subsidizing rural electric coops and electric lines, farm families throughout the Midwest used 200-3,000 watt wind generators to power lights, radios, and kitchen appliances. The modest wind industry that had built up by the 1930's was driven out of business by government policies favoring the construction of utility lines and fossil fuel power plants. In the late 1970's and early 1980's intense interest was once again focused on wind energy as a possible solution to the energy crisis. As homeowners and farmers looked to various electricity producing renewable energy alternatives, small wind turbines emerged as the most cost effective technology capable of reducing their utility bills. Tax credits and favorable federal regulations (e.g. The Public Utility Regulatory Policies Act of 1978) made it possible for over 4,500 small wind systems to be installed at individual homes between 1976 and 1985. See Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117. Another 1,000 systems were installed in various remote applications during the same period. Small wind turbines were installed in all fifty States during this period. These small wind farms, however, were not owned by large companies committed to long-term market development, and large-scale electric production for the consuming public. Therefore, when the federal tax credits expired in late 1985, and oil prices dropped to \$10 a barrel two months later, most of the small wind turbine industry once again disappeared. See generally, Michael Bergey, *A Primer on Small Wind Generators*, Home Power Magazine (1999).
  25. *Consolidated Edison Co. of N.Y. v. Village of Briarcliff Manor*, 208 Misc. 295, 144 N.Y.S.2d 379 (Sup. Ct. 1955).
  26. *Consolidated Edison Co. of N.Y.*, 144 N.Y.S.2d at 384.
  27. See U.S. Department of Energy - Wind Energy Resource Potential, available at [http://www.eere.energy.gov/windandhydro/wind\\_potential.html](http://www.eere.energy.gov/windandhydro/wind_potential.html) (site visited July 2006).
  28. *Id.*
  29. See *Cellular Tel. Co. v. Rosenberg*, 82 N.Y.2d 364, 372 (N.Y. 1993); *Payne v. Taylor*, 178 A.D.2d 979 (4th Dep't 1991); Salkin, *New York Zoning Law and Practice*, 4th § 12:03.
  30. See endnote 26 above.
  31. A wind facility must be an exempt wholesale generator (EWG) in order to take advantage of certain renewable credits in NY. As an EWG, the facility is subject to the rate and related regulation of the FERC under the Federal Power Act. It is also a "public utility" and "electric utility company" under the Public Utility Holding Company Act of 2005, but its upstream owners are exempt from the accounting, record-retention and reporting requirements of that Act (18 CFR 366.3) and its holding company has been granted blanket authorization to acquire interests in other EWGs without prior authorization under FPA Section 203 (18 CFR 33.1(c)(8)).

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## FROM THE FEDERAL COURTS

### **Second Circuit determines that the Coastal Zone Management Act does not create a private right of action.**

Citizens challenged the granting of permits for a fence by the New York City Department of Buildings on the grounds that the fence obstructed a public right of access to the beach and that the fence was approved without the City conducting a review of the environmental impact of the fence in violation of public and private rights under the federal Coastal Zone Management Act. Following the U.S. Supreme Court's ruling in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001), the Second Circuit noted that private rights of action to enforce a federal law must be created by Congress. Finding nothing in the text of the Act that would make the municipality liable to the plaintiffs for granting the building permit without reviewing the project to determine whether it is consistent with the coastal zone, and determining based on a structural review of the Act that there is no right of private enforcement, the Second Circuit adopted the holding of the Third Circuit and Western and Eastern District Courts in New York in holding that the Act does not create a private right of action. *George v. NYC Dept. of City Planning*, 436 F.3d 102 (2d Cir. 2006).

### **Southern District of New York holds that open space designation on subdivision map must be properly recorded with the County Clerk, and that illegally withholding a certificate of occupancy on the condition that the property owner give up the right to develop the rest of the property is a violation of 42 U.S.C.A. § 1983.**

General Municipal Law sec. 247 authorizes local governments to acquire "interests or rights in real property for the preservation of open spaces and areas...by purchase, gift, grant, bequest, devise, lease or otherwise." These interests may include a fee simple interest or development rights, easements, covenants or other contractual rights. GML sec. 247(4) specifically provides that "any interest acquired...is hereby enforceable by and against the original parties and the successors in interest, heirs and assigns of the original parties, provided that a record of such acquisition is filed in the manner provided by sec. 291 of the Real Property Law." While the planning board required, as a condition to subdivision approval, that two parcels shown on the subdivision map remain permanent open space and that no building permit should ever issue for these parcels, such requirement was never converted to an easement or other form of conveyance and was therefore not recorded in the office of the county clerk. Although the subdivision map filed with the town clerk contained a notation that those two lots were reserved for open space, when the property was later transferred as a result of a tax foreclosure, the new owners were

not subject to the restrictions that had applied to the original applicants and to anyone else who had actual notice of the restrictions. The court noted that when the Town placed this condition on the subdivision approval in 1963, they failed to protect the open space interest. The Town could have, recorded the map with the County Clerk, or they could have recorded the minutes from the planning board meeting which clearly state that no building permits were to be issued for those parcels, or the Town could have converted the restriction imposed by the planning board into a condition or easement and made that a document of record.

Where the building inspector illegally withheld a certificate of occupancy, conditioning it upon an unconstitutional requirement that the property owner first give up the right to develop the rest of the property, the Town acted in violation of the plaintiff's rights under 42 U.S.C.A. § 1983. *O'Mara v. Town of Wappinger*, 400 F. Supp. 2d 634 (S.D. N.Y. 2005).

## FROM THE STATE COURTS

### **Court of Appeals rules that religious organization was operating a use allowed under the zoning ordinance, and that since the challenge was initiated prior to the adoption of RLUIPA and was brought as a state claim, no attorneys fees could be awarded.**

The Court of Appeals determined that the Legion Church of Christ was operating an allowable conference and training facility, and not a college or seminary, consistent with the zoning ordinance where the ordinance provided that permitted principal uses in the relevant zoning district that encompassed conference and training facilities, which were defined to include, but were not limited to: "a. Continuing education activities and facilities. b. Classroom space and teaching equipment. c. Offices for staff," as well as indoor and outdoor recreational facilities and housing and dining facilities so long as such facilities are not operated as a public hotel or public restaurant. In examining the Church's activities on the land, the Court determined that they were no different than what was allowed, and that although in one course of education some Church members might reside at the facility for up to two years to complete their course of study, the Court determined that "nothing in the Town Code says or implies that only training programs of relatively short duration are permitted" in the district. The Court deemed it irrelevant as to whether the use could be labeled a college or a seminary as opposed to a conference or training center. The Court noted that since the Town Code made specific reference the opening the facilities to use by the public (e.g., housing and dining facilities), that the Town's primary concern was really short term, as opposed to long term, visitors.

Although the church prevailed in their disagreement with the town regarding the use of the subject prop-

erty as a conference and training center, since the case was initiated prior to RLUIPA and since the Court ultimately found for the Church under a state-law action which did not turn on a state counterpart to RLUIPA, but rather on a definition in the local zoning code, attorneys fees that might have been available to the prevailing party under RLUIPA were not available. *Town of Mount Pleasant v. Legion of Christ, Inc.*, 2006 WL 1525949 (N.Y. 2006).

**Court of Appeals determines that for purposes of signing a protest petition under Town Law 265(1)(b), the required boundary of 100 feet is to be measured from the boundary of the rezoned area. In addition, the Court found that the statute of limitations for the review of Findings Statement under SEQRA begins to run when a concrete injury is suffered.**

Typically, a rezoning requires a majority vote of the local legislative body, except under Town Law sec. 265(1)(b), a supermajority vote of the town board is required for a rezoning where owners of 20% of the land within 100 feet of the land included in the rezoning sign a protest petition. In a case of first impression, the Court of Appeals held that the 100 feet must be measured from the boundary of the rezoned area, not from the boundary line of the property in which the rezoned area is located. In this case, a "buffer zone" of between 200 and 400 feet was created between that portion of the landowner's property to be rezoned and the property line of their land. The Court noted that predictability and fairness dictated their decision since it "makes the power to require a super-majority vote dependent on the distance of one's property from the land that will actually be affected by the change." The Court found nothing wrong with the petitioners' assertion that this interpretation allows landowners who seek a rezoning to insulate themselves against protest petitions by "buffer zoning" or leaving a strip of (100 feet or more) property unchanged so as to eliminate the possibility of adjacent landowners who could sign a protest petition. The Court noted that the 100 feet requirement is that "where a buffer of that distance or more exists, neighbors beyond the buffer zone are not entitled to force a super-majority vote."

While CPLR 217[1] requires that an Article 78 proceeding be commenced within four months after a final determination by a body or officer, the statute of limitations begins to run when the petitioner suffers a "concrete injury." Although the town initiated a SEQRA process and culminated the review with the issuing of a Findings Statement, the Court of Appeals determined that no "concrete injury" was inflicted until the actual rezoning was enacted. In reaffirming *Save the Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 200 (1987), the Court of Appeals held that an Article 78 proceeding to annul a zoning change may be commenced within four months of the date the zoning change is adopted. However, the Court pointed out that "This does not

mean that, in every case where a SEQRA process precedes a rezoning, the statute of limitations runs from the latter event, for in some cases it may be the SEQRA process, not the rezoning, that inflicts the injury of which the petitioner complains." In the present case, the Court determined that there was no concrete injury until the rezoning was approved, and until such time as that event occurred, the injury was only contingent as there would have been no injury at all if the property owners were successful in defeating the rezoning. *Eadie v. Town Bd. of the Town of North Greenbush*, 2006 WL 1814384 (N.Y. 2006).

**Second Department notes that an action in mandamus cannot be used to compel a legislative body to act on an application for rezoning.**

Where the respondent waited for three years for the legislative body to act upon his request to change the zoning on his parcel of property from two-family to allow for multi-family and then instituted an action in mandamus to compel the board to act, the Court determined that such action can only be used to compel officials to act where they are duty-bound to perform, and legislative bodies are not duty-bound to vote upon every application for a zoning change. *Wolff v. Town/Village of Harrison*, 816 N.Y.S.2d 186 (App. Div. 2d Dep't 2006).

**Third Department concludes that a pest extermination business does not qualify as a "professional office."**

Where the zoning ordinance defined a "home professional office" as "[t]he office of a resident professional person, such as a dentist, physician, musician, engineer, teacher, lawyer, artist, architect or members of other recognized professions, and licensed real estate and insurance agents and brokers, where such office is a part of the residence building," the Court concluded that a pest extermination business did not qualify as a home professional office. Relying on a Court of Appeals decision (see, *Parochial Bus Systems, Inc. v. Board of Educ. of City of New York*, 60 N.Y.2d 539, 470 N.Y.S.2d 564, 458 N.E.2d 1241, 15 Ed. Law Rep. 855 (1983)), that discussed the term "professional" as one referring to the "learned professions" such as law and medicine, which requires extensive training, licensure and regulation, the Court here determined that although pest exterminators have to be certified by the Department of Environmental Conservation, this alone is insufficient to categorize the occupation as a profession. The Court noted, "While each municipality's zoning ordinance may have different language, in the zoning context courts have denied the status of profession to individuals engaged in other businesses." *Mack v. Board of Appeals, Town of Homer*, 25 A.D.3d 977, 807 N.Y.S.2d 460 (3d Dep't 2006).

**Supreme Court of New York County holds that participatory social dancing was not protected by the First Amendment, and that the licensure and regulation of such establishments through the City zoning resolution was a legitimate exercise of authority.**

In a proceeding to challenge the constitutionality of the City of New York's zoning resolution provision requiring the licensure of cabarets, the Supreme Court of New York County held that participatory social dancing, as an activity, is not an expression protected under the New York State Constitution or the First Amendment. Social dancing was described as dancing that "occurs among the patrons of an eating establishment with entertainment, done for the patrons' own pleasure, with only incidental benefit, if any, to observers." In determining whether conduct constitutes expressive speech entitled to protection under the First Amendment, courts look to whether there is an intent to convey a particular message and if so, whether that message would be understood by those who viewed it. While the U.S. Supreme Court has held that nude dancing is entitled to some level of First Amendment protection (see, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991)), they held in another case that "dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment" since such acts were not expressive conduct (see, *City of Dallas v. Stanglin*, 490 U.S. 19, 109 S. Ct. 1591,

104 L. Ed. 2d 18 (1989)). In 2005, the Fourth Circuit, relying on *Staglin* held that recreational dancing was not protected by the First Amendment (see, *Willis v. Town Of Marshall, N.C.*, 426 F.3d 251 (4th Cir. 2005)). The Court noted the difference between a dance performance and recreational/social dancing. Under the New York Constitution, dancing has not been regarded as a form of speech, but rather as conduct, and the court declined to expand the interpretation of the state constitution.

Where the City of New York sought to regulate and license cabarets through the zoning resolution, the legitimate purpose of which includes the protection of the health and safety of the people of the City of New York, a licensing requirement for eating and drinking establishments that offer participatory social dancing was not arbitrary. The City noted that "eating or drinking establishments which provide unrestricted entertainment and dancing tend to have a much wider service area, attracting larger numbers of people for varying lengths of time, thereby posing problems of increased pedestrian and vehicular traffic, with resultant congestion and increased noise." The court found the cabaret law reasonably related to the public safety and welfare. *Festa v. New York City Dept. of Consumer Affairs*, 12 Misc. 3d 466, 2006 WL 852083 (N.Y. Sup 2006).

**Opinion of Interest - Committee on Open Government**

Regarding a request for records that included correspondence and recommendations between a town planning board and its engineer and/or planner, such records constitute intra-agency materials but should be disclosed, at least in part. To the extent that intra-agency materials contain statistical or factual tabulations or data, that material should be subject to production and made available. Records submitted by or on behalf of an applicant are not properly characterized as intra-agency. *Committee on Open Government, FOIL Opinion No. 15297* (May 11, 2005) (available at <http://www.dos.state.ny.us/coog/ftext/f15297.htm>).

**FROM THE LEGISLATURE**

**Four hours of mandatory training required for members of planning and zoning boards.**

Both the Senate and the Assembly have passed S.B. 6316, which if signed will require all members of municipal planning and zoning boards to complete four hours annually of training, effective January 1, 2007. To be eligible for reappointment to the applicable board, a member must be in compliance with the law. Where more than four hours of training is received in a year, the law allows the time over four hours to be carried over to following years. Provisions in the Town Law, General City Law, Village Law and General Municipal Law currently authorize local legislative bodies to, at their option, institute a training requirement for planning and zoning board members. The law provides that the training program is to be approved by the municipality, and may include, but not be limited to, "training provided by a regional or county planning office or commission, county planning federation, state agency, statewide municipal association, college or other similar entity." Furthermore, the law provides that the training may be offered in a variety of formats including, but not limited to, electronic media, video, distance learning, and traditional classroom instruction. The new law mandates the training but allows municipalities to pass a resolution waiving or adjusting the amount of training required, when in the judgment of the local legislative body, it is in their interest to do so. Lastly, the law provides that no decision of the planning or zoning board will be voided or declared invalid as a result of a failure to comply with the training mandate. (S.B. 6316)

**RESOURCE OF INTEREST**

The Westchester Municipal Planning Federation and the Westchester County Planning Department have published "The Planning and Zoning Clerk Primer" available on-line at "<http://www.westchestergov.com/planning/regionalplan/WMPF/Primers/ClerksPrimer06.pdf>" (site visited July 2006).