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Effective Legal Strategies to Resolve New
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**Integrating Green Provisions into Comprehensive
Plans and Zoning Laws in New York State**

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I. Introduction

Over the course of the next several years land use and municipal attorneys in New York State will be faced with the challenge of working with and/or advising our local governments on how to best address potential impacts related to climate change, curbing greenhouse gas emissions, decreasing dependence on fossil fuels and reducing dependence on automobiles.

As we address these issues, we are presented a unique and challenging opportunity to assist our clients in taking advantage of the emerging technologies, innovative planning tools and new funding opportunities to generate green manufacturing jobs, update and modernize infrastructure and improve the quality of life in New York State.

This presentation will examine the tools available and focus on how a municipality can use existing regulatory frameworks through comprehensive planning, zoning laws and SEQRA regulations to arrive at an overall plan that can serve to reduce the municipality's carbon footprint, provide for orderly and balanced growth, and provide opportunities for increased rateables through green manufacturing jobs.

II. Comprehensive Plan

Town Law § 272-a; Village Law § 7-722; and General Cities Law § 28-a grant authority to local governments to consider and adopt comprehensive plans to plan the orderly growth and land use for the purpose of protecting the public health, safety and general welfare of its citizens. There are several aspects of the comprehensive planning that are underutilized and can serve as a mechanism for municipalities to set a course to promote green development.

- A. A comprehensive plan can be more than a justification for adopting zoning laws.
- “The town comprehensive plan is a means to promote the health, safety and general welfare of the people of the town and to give due consideration to the needs of the people of regions for which a town is part.” Town Law 272-a(f)¹.
 - A comprehensive plan is defined as “the materials written and/or graphic, including but not limited to maps, charts, studies, resolutions, reports, and other descriptive material that identify the goals, objectives, principals, guidelines, policies, standards, devices, and instruments for the immediate and long-range protection, enhancement, growth and development of the town located outside the limits of any incorporated village or city. Town Law § 272-a(2)(a).
 - A comprehensive plan may include; “General standards of goals, objectives, principals, policies and standards upon which proposals

¹ This presentation refers primarily to the Town Law. Similar provisions relating to comprehensive planning are found in Article Village Law § 7-722 and General City Law § 28-a.

for the immediate and long-range enhancement, growth and development of the town are based. Town Law § 272-a(3)(a).

- Comprehensive plans may include proposed measures, programs, devices and instruments to implements the goals and objectives of the various topics within the comprehensive plan. Town Law § 272-a(3)(m).

Discussion.

A municipality should understand that comprehensive planning process is for planning, not merely regulating, the orderly growth and development of a community. Therefore, municipalities should think outside the box to determine what programs, policies, guidelines, measures, etc. should be adopted to encourage green development.

For example, New York State conducts an existing program through local non-profits throughout the state to assist low and moderate income families to weatherize their homes to save energy. The funding for this program has been greatly enhanced by the Stimulus Money (American Resource Recovery Act). New York State Energy Research and Development Authority (NYSERDA) also has several programs to provide rebates for weatherization and implementing other energy saving and alternative energy features, i.e. solar, wind, geothermal, etc.² Section 487 of the New York State Real Property Tax Law provides a 15-year real property tax exemption for solar and wind energy systems constructed in New York State. A municipality can, within its comprehensive plan, identify and implement programs designed to educate the public on the availability of the programs and assist and promote these programs to help achieve energy efficiency. One such example is the Long Island Green Homes program established by the Town of Babylon. Further, municipalities can adopt standards or suggestions for carpooling, participating in and

² See NYSERDA.org for information on NYSERDA programs and funding opportunities.

assisting and publicizing opportunities for mass transit. Additionally, municipalities can enter program to promote tree planning, local farm markets, etc.

- B. Comprehensive plans can be used to foster regional planning activities.
- Comprehensive plans are intended to “foster cooperation among governmental agencies, planning and implementing capital projects in municipalities that may be directly affected thereby. Town Law § 272-a(1)(b).
 - Comprehensive plan may include “consideration of regional needs and the official plans of other government units and agencies within the regions.” Town Law § 272-a(3)(b)
 - Municipalities can use authorities set forth in Town Law § 284 and Village Law § 7-741 to provide for inter-municipal cooperation to adopt comprehensive plans that cross municipal boundaries to address issues such as regional transportation patterns, infrastructure needs and more global issues, such as carbon emissions and water quality.

Discussion.

It is impossible for a municipality to look only within its boundaries to address issues that may relate to global impacts of climate change. Any action taken by one municipality will have some impact on the neighboring communities. Inter municipal cooperation in comprehensive planning can provide more efficient services providing a financial as well as an environmental benefit to residents. For example, shared infrastructure serving both a village and town under an inter-municipal cooperation agreement should be included and considered within any comprehensive plan. Issues such as locations for future transmission lines needed to carry electricity generated by

alternate energy means, i.e., solar, wind, etc. cannot be appropriately examined if limited to the scope of each individual municipality.

B. Plan for Provision of Appropriate Infrastructure to Support Green Technology.

Existing and proposed general location of public and private utilities and structures should be included in a comprehensive plan. Town Law § 272-a(g).

Discussion

Any comprehensive plan should include an analysis of the current capacity of all existing infrastructure i.e. water, sewer to determine what upgrades need to be made, how such systems can be run more efficiently, and what alternative technology can be used to implement and upgrade such facilities. This is vital not only to guide future planning, but to allow municipalities to begin designing plans and be ready to apply for grants under stimulus and future funding. Most funding sources when announced are impossible to obtain if a municipality just starts considering them when such grants/programs are announced. Failure to consider and plan for utility upgrades may result in legal battles for a municipality. For example, the Village of Goshen stalled and stalled on replacing its sewer plant. DEC forced them to fix it at a cost of 30 million dollars. Further, as will be discussed more particularly below, it is important to consider what infrastructure improvements will be necessary to accommodate alternative energy sources such as solar, wind, geothermal, biomass for your community.

C. Need to Provide an Array of Housing Units and Mixed Uses to Accommodate Smart Growth and Green Development.

- “The great diversity of resources and conditions that exist within and among the towns of the state compels a consideration of such diversity and development of each town’s comprehensive plan.” Town Law § 272-a(1)(d).
- A comprehensive plan must consider “existing housing resources and future housing needs, including affordable housing.” Town Law § 272-a(3)(h)(see also Berenson v. New Castle)
- A comprehensive plan may consider the “present, potential future, general location of commercial and industrial facilities.” Town Law § 272-a(3)(k).
- A comprehensive plan may consider “The location and types of transportation facilities.” Town Law § 272-a(3)(f).

Discussion and Implementation.

In order to promote sustainable green development, a municipality should, in its comprehensive plan, provide for transportation oriented development and smart growth. This includes a discussion of how to provide a variety of transportation choices, mixed land uses to allow jobs to be located near housing units, create an range of housing opportunities and choices to entice a mixture of business and manufacturing facilities, especially green manufacturing, and create walkable communities.

III. Specific Planning and Zoning Issues Related to Alternative Energy Sources.

A. Solar Energy.

i. Individual homes and business.

1. Insure solar access. General City Law Section 20, Town Law § 263, and Village Law § 7-704 allows a city/town/village to adopt provisions protecting solar access.

2. Review building codes to insure appropriate provisions are located within the code and building inspectors are able to implement and enforce code provisions relating to appropriate installation of solar panels.
 3. Use provisions in comprehensive plan to adopt policies to promote financing opportunities to insure not only use of solar in new construction, but also in retrofits.
- ii. Solar Farms. In the comprehensive plan, identify areas where it may be suitable for solar farms due to southern exposures to sun, location near distribution lines, and proximity of end users.
1. Identify any necessary infrastructure improvements necessary to enhance distribution system to be able to store and distribute energy from any solar farm.
 2. Zoning issues. Define solar farms as essential service, utility or special use. Adopt laws with specific and clear provisions to promote the development of and insure such uses.
- iii. Solar Panel Manufacturers.
- a. Discuss and identify the need for manufacturing jobs within your comprehensive plan.
 - b. Identify existing facilities or areas that may accommodate a manufacturing facility.
 - c. Define solar panel manufacturing as non-nuisance industry or locate in areas that can accommodate.
 - d. Provide areas with adequate sewer, water and transportation, (i.e. road network, railroad, etc.) as you

would for any manufacturing area to promote and entice solar panel manufacturing into your community.

B. Geothermal.

- i. Understand the technology, educate your code enforcement officer.
- ii. Adopt appropriate permitting regulations, i.e. DEC groundwater protection.
- iii. As with solar panel manufacturers, provide opportunities for manufacturing facilities for geothermal heat pumps to allow for manufacturing and, therefore, distribution within the area.

C. Wind.

i. Individual turbines.

1. Comprehensive plan - identify where are the wind corridors.
2. Zoning - Identify zoning issues i.e., height issues, noise, visual impact, environmental safety.

ii. Commercial Wind Farms.

1. Comprehensive Plan - Identify large land areas with appropriate wind to entice developers.
 - a. Proximity to transmission lines.
 - b. Proximity of end users
2. Identify new technologies to help entice, mitigate impacts associated with large wind turbines.
 - a. Ex. Vertical wind turbines can be quieter and less harmful to bats and birds than traditional turbines
 - b. <http://www.powernaturally.com/Programs/Wind/toolkit.asp>
3. Zoning – identify site issues such as set backs, screening

4. Define Wind Farms as a essential service or utility. (See Wind Power Ethics Group v. Town of Cape Vincent ZBA, 2009 NY Slip Op 2016)(4th Dept)(Appellate Division upheld ZBA determinate that wind farm was within the definition of a utility).

- D. Biomass recycling.
 - i. Comprehensive plan - identify impact associated with locating such a facility, identify appropriate clear and concise mitigation measures to promote development in recycling.

IV. Transportation Oriented Development – Smart Growth

- A. Ten Principles of Smart Growth
 - i. Provide a Variety of Transportation Choices
 - ii. Mix Land Uses
 - iii. Create a Range of Housing Opportunities and Choices
 - iv. Create Walkable Neighborhoods
 - v. Encourage Community and Stakeholder Collaboration
 - vi. Foster Distinctive, Attractive Communities with a Strong Sense of Place
 - vii. Make Development Decisions Predictable, Fair and Cost Effective
 - viii. Preserve Open Space, Farmland, Natural Beauty and Critical Environmental Areas
 - ix. Strengthen and Direct Development Towards Existing Communities
 - x. Take Advantage of Compact Building Design and Efficient Infrastructure Design

DISCUSSION:

These smart growth principals can be incorporated into any comprehensive plan and can accommodate the use of the green technologies discussed above. One example of

encouraging community and stakeholder collaboration can be seen at the Sullivan County Community College where a wind turbine developer has leased land to build a vertical shaft wind turbine and will provide the college with most if not all of its electricity needs under a power agreement. Ideas such as these can be incorporated in the comprehensive planning process.

V. Proactive Use of SEQRA.

- A. Department of Environmental Conservation will address greenhouse gas emissions as part of its SEQRA review
 - i. <http://www.dec.ny.gov/environmentdec/56646.html>
 - ii. Developers will be required to examine and mitigate impacts associated with energy use/green house gases.
- B. Pre-approve or set development environmental thresholds for development by utilizing SEQR to prepare generic EIS.
 - i. Authority: Environmental Conservation Law and Regulations, 6 NYCRR 617.10.
 - ii. Using a Generic EIS, establish green development corridors. If wind farm/solar developers meet the thresholds examined in the EIS, no further review is necessary.
 - 1. Note: Cost for preparing such generic environmental assessment impact statement can be charged back to specific applicants pursuant to 6 NYCRR 617.13(a)
 - iii. Mitigation
 - 1. Require green technologies
 - 2. Require more efficient building design and operation