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Siting Backyard Wind Power Facilities Under the Zoning Laws of New York State

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I. Executive Summary

The goal of this article is to extract, analyze and explain the most common and important elements of New York municipal and state law concerning the siting of small-scale wind energy conversion systems (WECS). This review of New York State municipal zoning laws indicates three overarching approaches to regulating small-scale wind facilities. Towns that designate WECS as “accessory uses” to a property or zone’s primary use should be viewed as most accommodating of small-scale wind generation because these types of projects will only be evaluated according to measureable objective criteria, such as meeting requisite height limitations, abiding by setback requirements, or keeping noise generation below a predetermined decibel level. Conversely, Towns that regulate small-scale WECS through the special use permit reserve discretion for local zoning decision-making bodies to assess a WECS applicant according to more subjective measures (*e.g.* whether a WECS structure “interferes” with a scenic viewshed). Not surprisingly, town boards that are given evaluative discretion with less exacting standards are likely to be more susceptible to community pressure and NIMBY-motivated fear mongering. Finally, some communities have passed moratoriums on the construction of small-scale and larger wind generators. Although it is unconstitutional for a community to institute an outright ban on any given use of property, temporary bans set to lapse after several years have been deemed legitimate for the purpose of gauging community input and rewriting a local zoning code or comprehensive plan. Therefore, in addition to looking for towns that regulate WECS siting through the accessory use or a similar method, firms interested in marketing and installing small-scale WECS in New York State should identify (1) jurisdictions that have completed long-range comprehensive plans which demonstrate an interest in developing renewable energy resources within the town, as well as (2) towns, such as Brighton, NY, that have added a “floating zone” or “planned use development” (PUD) provision to their zoning code that encourages a community or developer to apply the floating zone to an area in order to pursue mixed use development and “non-traditional” residential uses of land, including backyard WECS.

II. Background

In an effort to halt global climate change and decrease the nation’s dependence on foreign sources of energy, the United States has begun to look toward renewable sources of electricity generation to lessen its carbon footprint while simultaneously improving its strategic energy security. One of the more promising and market ready renewable energy sources is wind power, a source of energy that, according to a 2009 Harvard University report, has potential to generate up to sixteen times more electricity than the current energy demand of the United States.¹ However, “exploitation of [the U.S.’s wind] resource will

¹ Xi Lu et al., *Global Potential for Wind-Generated Electricity*, 106 PNAS 10933, 10936-37 (2009).

require [a] significant extension of the existing power transmission grid” because large-scale wind farms often need to be sited in remote areas far away from the load demand of U.S. population centers.² As recent wind farm litigation in New York State demonstrates,³ the siting of wind farms near communities, on top of mountain ridgelines, and in close proximity to valued natural resources foments opposition from a wide range of stakeholders and can dramatically increase the amount of time, effort, and expense required to obtain installation approval for a viable large-scale wind facility.

Large-scale, industrial wind farm development has stoked controversy even when siting proposals are located in less densely populated areas of the country. Wind farms have been blamed for disrupting “scenic viewsheds,” upsetting the “character of the community,” causing health problems, and even creating risk of physical harm.⁴ An approach that would avoid the attendant siting challenges of “wind farm” development while still allowing New Yorkers to take advantage of this clean and abundant energy resource is to promote the adoption and development of smaller-scale wind facilities which are sited closer to the residences, businesses, and communities in which the consumers of electricity live and work. So-called “backyard wind” facilities are a type of “distributed generation,” a term that encompasses “a range of smaller-scale and modular devices” that produce electricity in closer to proximity to consumption points.⁵ In light of the logistic and political difficulties utilities often encounter in siting transmission lines,⁶ distributed energy methods like small-scale wind carry potential to bring much needed “load” onto the grid while avoiding the costs and political backlash of laying new transmission capacity. However, development of larger-scale wind generation projects depends on the alignment of a diverse set of stakeholder interests: private developers, public utilities, local, state, and federal government, and a diverse range of community groups. From a consumer perspective, the advantage of backyard wind is that electricity generated by an on-site turbine will offset the cost of electricity that would have otherwise been purchased from the utility and delivered to the consumer through transmission lines. Several jurisdictions, including New York, allow utilities to offer property owners an opportunity

² Xi Lu et al., *supra* note 1, p. 10937.

³ Wind developer Ecogen LLC has sought to install nearly forty wind turbines in the towns of Prattsburgh and Italy, NY for over a decade. In March 2011, the state Supreme Court held that an agreement allowing the project to move forward between Ecogen and outgoing “lame duck” members of the Prattsburgh town board must be honored because the company’s right to build the turbine field had “vested” through the agreement and could not be rescinded. The portion of Ecogen’s project slated for Italy, NY was denied a special use permit, a decision which the company has appealed. *Ecogen Winds LLC v. Town of Prattsburgh*, No. 09-10682 (N.Y. Sup. Ct. 2011).

⁴ See, e.g. Kate Galbraith, *Ice-Tossing Turbines: Myth or Hazard*, N.Y. TIMES Dec. 9, 2008, <http://green.blogs.nytimes.com/2008/12/09/ice-tossing-turbines-myth-or-hazard/> (Detailing a local news report from England where “lumps of ice three or four feet long flew through the air” from a spinning blade of 410 ft. tall wind turbine and into a carpet showroom and a parking lot).

⁵ Distributed Energy, U.S. Dep’t of Energy, <http://www.oe.energy.gov/de.htm> (last visited Apr. 9, 2011).

⁶ See Kate Galbraith, *Lack of Transmission Lines is Restricting Wind Power*, N.Y. TIMES, Jan. 20, 2011, available at <http://www.nytimes.com/2011/01/21/us/21ttransmission.html?emc=tnt&tntemail=y>.

to sell energy not needed by the household back to the grid, further reducing electricity bills.⁷ Therefore, from an energy policy perspective, access to smaller-scale wind energy generation could help the nation achieve its energy goals more quickly.

Despite the promise and advantages of distributed renewable energy, there is growing opposition against small-scale wind projects based on concerns similar to those levied at larger-scale wind farms. These complaints include a WECS facility's detrimental impact on the character of residential neighborhoods, residence safety, wildlife preservation, and even health.⁸ Furthermore, even in an age where there is a growing consciousness, awareness, and concern about the impact about global climate change, "policymakers in the United States have been repeatedly frustrated by constituents who profess to worry about the climate and count themselves as environmentalists, but prove unwilling to adjust their lifestyles or change their behavior in any significant way."⁹ Community discomfort and unease with siting WECS facilities in traditional commercial and residential areas is manifested in local zoning laws which, for the most part, are fairly restrictive towards attempts to introduce new uses that would interrupt a zones uniform and homogeneous design. However, there are some notable exceptions¹⁰ and the fact that so many of New York's towns have gone to the trouble of incorporating small-scale wind specific provisions into their codes is an encouraging sign in itself. Although this paper will demonstrate that the regulatory hurdles for small-scale wind development are by no means inconsequential, one of its benefits is that the typical application and approval process typically requires less layers of government and generates less vociferous public opposition.

III. Grid Interconnection Issues Related to WECS

i. New York Standard Interconnection Requirements (NYSIR)

In order for an energy generation source to link and provide power to the public electricity grid, the owner of the facility must comply "interconnection system requirements" set by their state and independent system operator (ISO). Part of what makes New York an attractive venue for distributed small-scale generation projects is that the New York Public Service Commission (PSC) has recently streamlined the state's standardized interconnection requirements (SIR) for smaller-scale distributed

⁷ See N.Y. PUB. SERV. §66-1, *infra* note 29.

⁸ "A doctor says she's conducted research that suggests that people living close to wind turbines are susceptible to what she calls Wind Turbine Syndrome (WTS), an illness with symptoms including sleep disorders, heart disease, panic attacks and headaches" Posting of Katie Fehrenbacher, *Wind Turbine Syndrome*, to www.Gigaom.com (Aug. 3, 2009).

⁹ Elizabeth Rosenthal, *Green Development? Not in My (Liberal) Backyard?* N.Y. TIMES, Mar. 12, 2011, <http://www.nytimes.com/2011/03/13/weekinreview/13nimby.html>.

¹⁰ See, e.g. TOWN OF ISLIP, N.Y., CODE § 68-420.9, which designates backyard wind facilities as an "accessory use" in areas zoned residential.

power sources generating less than 25 kW of electricity.¹¹ With this lightened regulatory burden, New Yorkers seeking to capture the financial and environmental benefits of wind power by leveraging the state's substantial wind energy resources¹² will have an easier time linking their wind energy collection systems (WECS) to the power grid. Initially adopted in December 1999, and having gone through several revisions since, the NYSIR rules enable owners of distributed generation facilities to obtain permission from the PSC to connect WECS generating 25 kW or less to the electric grid in six steps.¹³ For New York consumers interested in installing a unit that complies with this limitation, the American Wind Energy Association (AWEA) lists a number of models made by other companies which qualify for PSC's 25kW or less limit.¹⁴ Aside from a turbine's listed production capacity (5 kW, 10 kW, 25 kW), there are several environmental factors that contribute to determining the electrical output of a given WECS facility, including average site wind speed, turbine height, and the presence of any nearby obstructions (houses, trees, etc.).¹⁵ Although calculating the potential electric output of the various small-scale WECS models and units currently on the market is beyond the scope of this article, ensuring an acceptable economic return on a WECS investment is likely to be central to calculus for households and businesses considering a small-scale wind installation.¹⁶

New York's six-step interconnection process involves an initial communication of interest to pursue on-site interconnection from the applicant to the PSC, a review of the proposed project by the local utility, the applicant's filing of an application, WECS system installation, on-site interconnection testing at the applicant's WECS, and final acceptance following a successful on-site test.¹⁷ New York's fairly straightforward and expedited process compares favorably with the interconnection requirements in neighboring states where, for example, applicants must agree to an "interconnection feasibility study" of

¹¹ N.Y. DEP'T OF PUB. SERV., NEW YORK STATE STANDARDIZED INTERCONNECTION REQUIREMENTS (SIR) 2 (2009) [*hereafter* NYPSC SIR REPORT].

¹² Xi Lu et al., *supra* note 1, p. 10936 (finding that New York State has the potential to generate eighty-seven terrawatts (Twh) of electric power from its annual wind resources, enough to meet .54 of its current statewide electric power demand).

¹³ NYPSC SIR REPORT, *supra* note 11, at 2-4.

¹⁴ The term "small wind" generation encompasses WECS units capable of producing up to 100 kW of capacity. American Wind Energy Association (AWEA), Equipment Providers, http://www.awea.org/learnabout/smallwind/equipment_providers.cfm (last visited 4/2/2011).

¹⁵ JIM GREEN, NATIONAL RENEWABLE ENERGY LABORATORY, OVERVIEW: ZONING FOR SMALL WIND TURBINES 6 (2008), *available at* http://www.windpoweringamerica.gov/small_wind.asp.

¹⁶ The U.S. Department of Energy's "Wind Powering America" website contains a number of helpful resources for parties interested in pursuing small-wind investments. U.S. Dep't of Energy, Wind Powering America, http://www.windpoweringamerica.gov/small_wind.asp (last visited 4/2/2011).

¹⁷ The six-step application process for distributed WEC facilities generating 25 kW or less should be distinguished from the 11- step process PSC has established for facilities generating between 25kW and 2 MV of electricity. N.Y. PUB. SERV. COMM'N., NEW YORK STANDARDIZED INTERCONNECTION REQUIREMENTS AND APPLICATION PROCESS FOR NEW DISTRIBUTED GENERATORS 2 MW OR LESS CONNECTION IN PARALLEL WITH UTILITY DISTRIBUTION SYSTEMS 2-4 (2010), *available at* <http://www3.dps.state.ny.us/W/PSCWeb.nsf/All/DCF68EFCA391AD6085257687006F396B?OpenDocument>. [*hereafter* "PSC NYSIR Application Process"].

indeterminate length,¹⁸ relatively high application fees, and an overall lack of standardized application procedures.¹⁹ While there are no application fees to request grid interconnection for WECS systems generating 25 kW or less in New York, the PSC does stipulate that, since a utility may determine it necessary to provide the generating source with a dedicated transformer to “protect the safety and adequacy of electric service,” applicants may be required to pay a maximum of \$750 for the WECS equipment.²⁰ Seeing the potential cost burden on property owners and businesses as a potential deterrent to capitalizing on New York’s abundant wind resources, alternative energy proponents are advocating methods of offsetting small-scale wind’s high front-end installation costs with cash and tax incentives from the federal and state government.

ii. Incentives

The 2009 American Reinvestment and Recovery Act provided the backyard wind movement with a significant boost by expanding the federal alternative energy investment tax credit (ITC) to allow small wind consumers to apply 30% of the total purchase and installation cost of a small wind system as a tax credit through 2016.²¹ In New York, the state offers a program that offsets the installation cost of WECS that generate between 800W-250kW of electricity annually. This “tiered” incentive program, operated as part of the New York State Energy Research and Development Authority’s (NYSERDA) “Power Naturally” initiative, offers customers a \$3.50/kWh for the first 10,000 kilowatt-hour hours they generate in a year (“Tier 1”), \$1.00 kWh for the next 115,000 kWh generated (Tier 2), and \$0.30 for all annual output above 125,000 kWh (Tier 3).²² The amount a customer is eligible to receive is based on the expected annual energy output of a given system, as determined in advance by New York State’s small wind “predictor,” a product supported by the company AWS TruePower.²³ These NYSERDA incentive payments for backyard wind are issued to customers in two separate payments: 65% of the incentive is paid upon equipment delivery and when all necessary permits, approvals and certifications are secured from all jurisdictions; the remaining 35% of the incentive is paid when the wind system is grid-connected and approved by the utility.²⁴ Under this program, all cash incentives are paid directly to the approved installer of the system who is then required by law to share the state subsidy with program participants as

¹⁸ New England Independent System Operator (ISO), New or Modified Interconnections for Small Generators (<=20 mw), http://www.iso-ne.com/genrtion_resrcs/nwgen_inter/smgen_20/index.html (last visited 4/2/2011).

¹⁹ LAUREL VARNADO & MICHAEL SHEEHAN, INTERSTATE RENEWABLE ENERGY COUNCIL, A GUIDE TO DISTRIBUTED GENERATION INTERCONNECTION ISSUES 24 (2009).

²⁰ PSC NYSIR Application Process, *supra* note 17.

²¹ American Reinvestment and Recovery Act (RCRA), Pub. L. No. 111-5, Sec. 1103 (2009); Most people prefer tax credits as opposed to deductions because a tax credit reduces tax dollar-for-dollar, while a deduction only removes a percentage of the tax that is owed.

²² Power Naturally, On-site Wind Incentives Program <http://www.powernaturally.org/programs/wind/incentives.asp> (last visited May 11, 2011).

²³ See Small Wind Explorer, <http://nyswe.awstruepower.com> (last visited May 11, 2011).

²⁴ On-site Wind Incentives Program, Power Naturally, *supra* note 22.

cost savings.²⁵ The Long Island Power Authority (LIPA) offers its customers additional incentives in the form of rebates that pay property owners who have installed approved backyard wind models \$3.50 per kilowatt-hour (kWh) up to 16,000 kWh produced annually on-site.²⁶ Finally, New York State offers a 15 year real property tax exemption for installed residential small wind systems, qualified as the amount equivalent to the overall value added to the property from the addition of wind energy capabilities.²⁷

iii. Net-Metering

Another key motivator for New Yorkers to build small-scale WECS facilities and to take advantage of the PSC's expedited NYSIR process is to achieve cost savings associated with "net metering." Net metering refers to a capability that allows residences and businesses generating power from on-site distributed energy facilities (*e.g.* WECS, solar, natural gas generators) to not only consume the electricity they generate but also to sell back to the grid any unconsumed surplus power that the on-site generator creates. Originally established in 1997, New York's net metering program has been reenergized in the last three years with the passage of legislation expanding the program's availability to non-residential WECS installations that will allow connection of larger WECS facilities to the grid.²⁸ In New York State, "[n]et-metering customers are billed only when they consume more power than they generate."²⁹ If, at the end of a billing period, a customer selling back power through net metering technology has produced "a net surplus of power," the customer will receive a rebate from the utility instead of a bill. Furthermore, New York is one of several states to permit customers to net meter under a "Time of Use" (TOU) tariff, a cost allocation method that rewards customers for putting surplus energy onto the grid during "peak" hours. "Peak usage" or "peak load" refers to times of day when system wide demand for electricity across a given portion of the grid approaches the overall production capacity, causing the utility to bring online back-up "peaker plants," which tend to be less energy and cost efficient, "when energy demand threatens to exceed supply."³⁰ Therefore, with its time of use" cost compensation pricing structure, New York State enables net metering customers to be compensated more when they produce surplus power during peak load periods.³¹ As one author noted, "[c]onnecting a wind-electric

²⁵ On-site Wind Incentives, Program, Power Naturally, *supra* note 22.

²⁶ Long Island Power Authority, Rebates and Forms,

²⁷ N.Y. REAL PROP. TAX LAW §487 (McKinneys 2011).

²⁸ Jennifer Kho, *Net Metering to Shine on in New York, California*, GIGAOM, Feb. 24, 2010, <http://gigaom.com/cleantech/net-metering-to-shine-on-in-new-york-california/>.

²⁹ N.Y. PUB. SERV. §66-l (2) (2010) ("An electric corporation shall provide for the interconnection and net energy metering of wind electric generating equipment owned or operated by a customer-generator"); David Kirby, *The Year in Ideas: Net Metering*, N.Y. TIMES, Dec. 15, 2002.

³⁰ FUTURE OF PRIVACY FORUM, INFORMATION AND PRIVACY COMMISSIONER, ONTARIO, CN, SMART PRIVACY FOR THE SMART GRID 5 (2009).

³¹ "TOU metering is seen as a mechanism to better link customer consumption decisions with the actual price of generating the energy customers consume." LAUREL VARNADO & MICHAEL SHEEHAN, INTERSTATE RENEWABLE ENERGY COUNCIL, A GUIDE TO DISTRIBUTED GENERATION INTERCONNECTION ISSUES 16 (2009).

system to the utility grid . . . gives you the best of both worlds. You have the unlimited capacity of the grid at your disposal, and you can send your surplus wind energy to the grid.”³² This net metering initiative will play a significant role in New York’s effort to achieve its Renewable Portfolio Standard (RPS) goal of obtaining 30% of its electricity from renewable sources by 2015,³³ by allowing for surplus power produced at distributed locations to reduce the overall demand for power generated by far-away fossil-fuel burning generators.

IV. Siting Small-Scale Wind Energy Conversion Systems (WECS) In New York

Zoning and project siting authority in New York are primarily the function of local administrative authority and exercised by municipal zoning boards, planning boards and other local decision-making entities.³⁴ Accordingly, several New York municipalities have anticipated an increased demand from constituents to erect small-scale WECS in neighborhoods and business developments by enacting wind power specific provisions in their municipal zoning codes. It should be noted from the outset that the aim of these statutes is not necessarily to promote adoption of small-scale on-site WECS, but rather, to set the terms, standards, and criteria by which local legislatures, zoning boards, and planning committees may assess the appropriateness of an on-site WECS in a given location. “Local wind laws typically impose height restrictions on wind towers . . . Nearly all local wind laws require wind turbines to be set back from residences, power lines, public roads, and property lines . . .”³⁵ The goal of this article is to extract, analyze, and explain the most common and important elements of New York municipal and state law concerning the siting of small-scale WECS. This discussion is divided among the following sections: comprehensive plans, accessory use provisions, special use permit provisions, special planned unit districts (PUDs), moratoriums on wind power projects, and finally, the requirements imposed on small-wind developers, property owners, and local governments under New York’s State Environmental Quality Review Act (SEQRA).

i. Comprehensive Plans

In New York State and elsewhere, local comprehensive plans serve to establish shared community goals, plan for long-term utilization of community resources, and serve to legitimize local decisions and regulations when reviewed by courts.³⁶ Furthermore, under section 272-a of New York’s Town Law,

³² *Wind Electricity Basics*, HOMEPower MAGAZINE, <http://homepower.com/basics/wind/>.

³³ NYSERDA, *The New York Renewable Portfolio Standard*, <http://www.nyserda.org/rps/index.asp> (last visited 4/2/2011).

³⁴ N.Y. MUN. HOME RULE § 10(4)(a) (2010).

³⁵ JOHN R. NOLON & PATRICIA SALKIN, CLIMATE CHANGE AND SUSTAINABLE DEVELOPMENT LAW 325 (2011).

³⁶ “When local zoning is challenged, courts will look to a community’s comprehensive plan for guidance on the rationale for and intent behind local regulations.” NYSERDA, WIND ENERGY DEVELOPMENT AND THE

“communities that use zoning must base that zoning on an adopted comprehensive plan.”³⁷ In the context of siting wind turbines, the inclusion of wind energy in a town’s comprehensive plan can serve to attract outside investment, assist with appropriate management of particularly windy geographic locations, preempt NIMBY-inspired opposition to WECS siting by first obtaining and then documenting community buy-in in advance of WECS facility siting decisions, and alert subsequent purchasers of property of the community’s long-range renewable energy strategy and development plan. A town comprehensive plan that either identifies areas intended for siting of residential renewable energy facilities or promotes the use of renewable energy more generally will strengthen a town planning or zoning board’s subsequent decision to grant a permit to a WECS applicant.

Comprehensive planning has been interpreted by the New York Court of Appeals to be an “almost universal statutory requirement” of any local zoning scheme so that local land use decisions give due consideration to the “needs of the community as a whole.”³⁸ Thus, by providing a platform for policymakers to determine how to efficiently allocate a jurisdiction’s monetary and natural resources, as well as well as a venue for taxpayers to offer input on their aspirations for the direction of the community, comprehensive planning in New York serves both utilitarian and democratic ends. Furthermore, for the purposes of siting a WECS facility that will survive Article 78 review, “New York law suggests that comprehensive plans include components regarding the location of public and private utilities and infrastructure, the protection of the sensitive environmental areas and the improvement of the local economy.”³⁹

According to NYSERDA, a comprehensive plan should have four parts: 1) inventory, 2) analysis, 3) goals and Objectives, and 4) implementing an action strategy.⁴⁰ Taking “inventory” of a community’s available wind resources is critical toward ensuring that the highest yield areas of a locality are available for wind development. The “analysis stage” recommends that communities take into account uses of land already in existence to identify high yield wind areas that represent “less compatible scenarios for wind energy development because of potential conflicts.”⁴¹ As demonstrated by the following survey of wind-related statutes, potential conflicts with wind turbines range from disturbance of scenic viewsheds, noise generation, interruption of broadcast and military aircraft communication signals, and the somewhat more nebulous “impact on the character of the community.” The third stage, setting community goals and

COMPREHENSIVE PLAN 3 (2005), available at www.powernaturally.org/Programs/Wind/toolkit/comprehensiveplan.pdf. [hereafter “NYSERDA Comprehensive Plan Report”].

³⁷ N.Y. TOWN LAW § 272-a (2010); NYSERDA COMPREHENSIVE PLAN REPORT, *supra* note ___, p.3.

³⁸ *Udell v. Haas*, 21 N.Y. 463, 469, 235 N.E.2d 897, 900 (1968).

³⁹ John R. Nolon & Jessica A. Bacher, *Wind Power: An Exploration of Regulation and Litigation* 3 (Feb. 20, 2008), available at digitalcommons.pace.edu/cgi/viewcontent.cgi?article...lawfaculty.

⁴⁰ NYSERDA COMPREHENSIVE PLAN REPORT, *supra* note 36, at 3.

⁴¹ NYSERDA COMPREHENSIVE PLAN REPORT, *supra* note 36, at 4.

objectives, suggests that community leaders “meld public opinion with the factual information derived from the inventory and analysis to guide the plan’s final recommendations for action.” The final stage is to set the comprehensive plan in motion by identifying specific areas intended for wind generation development. Although this process will inherently involve locations where wind “yield” is most heavily concentrated, it is recommended that this process incorporate community expectations and opinions to avoid future opposition and litigation. More importantly, a court will be more willing to uphold approval of a wind generation facility (large or small) if it is consistent with a development scheme set out in a comprehensive plan.

ii. Accessory Use

An accessory use is defined as a use of land found on the same lot as the principal use which is “customarily incidental and subordinate to” the principal use of property.⁴² Accessory uses are generally considered consistent with the character of a given zone because they have been “commonly, habitually, and by long practice” associated with the principal use of property throughout a type of district or neighborhood.⁴³ Compared with special use permits, which must be applied for and scrutinized by a municipal zoning board using somewhat *subjective* criteria, requests to install an accessory use are typically granted after meeting strictly *objective* standards applied by a zoning enforcement officer. For example, within a residential zoning district, a garage is customarily listed as an accessory use within a residential district.⁴⁴ Conversely, installation of a tennis court, a basketball court, or Olympic-size swimming pool would likely not fall into the definition of or be explicitly listed as “accessory” in most residential areas may require a more searching analysis by a local administrative board. The classification of a use of land as “accessory” to a principal use within a zoning code represents a legal recognition that property owners can reasonably expect to pursue both the principal and accessory uses on their land without significant regulatory interference.

Since the designation of an accessory use generally carries with it a relatively permissive standard for zoning board approval, property owners, real estate developers, and government officials interested in promoting the expansion of small-scale, residential renewable energy should press their respective legislative bodies to expand their zoning code’s definition of “accessory,” the two most commercially available types of small-scale renewable energy, solar and wind. However, it is important to recognize that the designation of a specific use of property as “accessory” to a given district or property’s principal

⁴² Mamaroneck Beach & Yacht Club, Inc. v. Zoning Bd. of Appeals of Vill. of Mamaroneck, 53 A.D.3d 494, 862 N.Y.S.2d 81 (N.Y. App. Div. 2d Dep’t 2008).

⁴³ JOHN NOLON, USING LOCAL LAND USE AUTHORITY TO ACHIEVE SMART GROWTH 160 (2001).

⁴⁴ See, e.g. TOWN OF NISKAYUNA, N.Y., CODE §210-10(A)(2)(a) (2010) (Listing private garages as a permitted “accessory use” within the town’s Rural Residential District. Other accessory uses in this district include private swimming pools, buildings accessory to agricultural operations, and stables for the quartering of horses.).

use does not mean that such a use will be permitted without undergoing some level of regulatory scrutiny, depending on a given jurisdiction's statutory-based accessory use criteria. Professors Nolon, Salkin, and Gitelman identify five "approaches" municipalities may employ to regulate accessory uses in their zoning codes: (1) a permissive approach that allows accessory uses which are "customary and incidental," not specifying the types of uses that fall under this category; (2) an exhaustive approach that recognizes as "accessory" only those uses which are explicitly listed as such in the municipal zoning code and excluding those which are not mentioned; (3) an illustrative approach that lists examples of the types and characteristics of accessory uses in a given zone, thus giving enforcement guidance to zoning officials to help interpret which uses may be considered "accessory"; (4) a flexible approach of listing only characteristics which are either prohibited among accessory uses; and (5) listing accessory uses that are allowed only after obtaining a "special use permit" or meeting other administrative requirements.⁴⁵

As the following survey of municipal codes demonstrates, accessory use provisions can be individually tailored to fit the outlook of the legislature and stakeholder community toward the proposed activity. While the accessory use designation is generally a sign that the applicant needs only to meet objective standards (*e.g.* height restrictions, setback measurements, decibel limits), municipal codes may deviate from this approach when dealing with new and/or controversial uses. This is particularly true of residential renewable energy sources that - although certainly embraced in some communities - can stir controversy and NIMBY-inspired sympathies in others, particularly when placed in close proximity to residences or viewsheds.⁴⁶ Unsurprisingly, the statutory requirements for accessory uses tend to be more demanding and complex in neighborhoods with higher residential housing density. Hence, a municipal code that classifies rooftop or backyard wind and solar generators as "accessory uses" run the gamut between the permissive and restrictive ends of the regulatory spectrum.

Moderate accessory use regulations for residential wind generation units include, but are not limited to, restrictions on the structure's height, sound emissions from the turbines, setback distance from the street or neighboring properties, structural design specifications, and decommissioning requirements. Municipal zoning codes will likely restrict the type of districts in which wind generators may be located. As discussed previously, accessory use restrictions on small-scale backyard WECS will generally contain objective and measureable standards, and will avoid questions regarding public policy or the WECS' impact on the "character of the neighborhood." However, a municipality can design its accessory use statute to be as extensive as it believes necessary. Therefore, while the standards and criteria a WECS

⁴⁵ JOHN R. NOLON, PATRICIA E. SALKIN, & MORTON GITELMAN, *LAND USE AND COMMUNITY DEVELOPMENT* 259-260 (7th ed. 2008) (hereafter, "NOLON, SALKIN, & GITELMAN").

⁴⁶ "We object to [my neighbor's] [front yard] windmill because it will make noise, create movement with odd shadows and be an eyesore to look at." See John Upton, *NIMBY Rears its Head Against Wind Power Project*, N.Y. TIMES, Nov. 11, 2010, <http://www.nytimes.com/2010/11/12/us/12bcwindmill.html>.

applicant must meet may still be objective, the number of requirements and the extensiveness with which they are enforced will vary among each municipality.

In the Village of Sylvan Beach, N.Y.'s municipal ordinance designates all WECS to be "detached" accessory uses which are permitted in all residential districts without any additional limitation beyond what is required of all other similarly classified uses (*e.g.* decks, patios, terraces, boats stored outdoors, or detached residential garages).⁴⁷ Accordingly, because the ordinance has not carved out a special accessory use provision for WECS, code enforcement officials in Sylvan Beach may evaluate proposed projects using standards which are in no way designed to assess the viability or safety of a proposed wind project. That said, within the general regulations for all accessory uses in the village, three provisions could have potential impact on backyard WECS projects in Sylvan Beach: (1) the limitation of no more than two accessory uses per property, (2) forbidding any accessory use to be closer than 10 ft. from a primary residence, and (3) a height limitation on all accessory uses of 24 ft.⁴⁸ In considering how to generate as much energy as possible from a WECS installation, these type of restrictions could have serious impact on the economic viability of WECS project because wind typically blows harder at distances higher from the ground. However, Sylvan Beach property owners and/ or developers interested in building taller WECS structures may be able to obtain area variances permitting construction beyond code's 24 ft. limit.⁴⁹

Another example of an ordinance designating WECS as an accessory use with fairly limited statutory requirements is the town of Orchard Park, outside of Buffalo, N.Y. Orchard Park's zoning ordinance lists windmills and other "similar energy converting devices" within the "accessory structures" subsection and regulates only the structure's height (no greater than 40 ft.) and the structure's "setback" from any side or rear lot line or building (no more than the overall height of the structure, plus 10 feet).⁵⁰ Although at first blush, Orchard Park's accessory use provision contains minimal restrictions on WECS facilities relative to other New York municipal statutes, the statute establishes from the outset that small-scale wind facilities will only be permitted in agricultural (A-1) and industrial (I-1) districts.⁵¹ This allowance for WECS only in a discrete set of districts is a good example of how important detailed nuances can be buried in statutory language and, therefore, why parties interested in exploring development of small-scale wind energy systems cannot assume that a particular use will be allowed simply because it is designated an accessory use. While it is disappointing to see a municipality like

⁴⁷ VILL. OF SYLVAN BEACH, N.Y., CODE § 136-28 (2010).

⁴⁸ See VILL. OF SYLVAN BEACH, N.Y., CODE § 136-28(D).

⁴⁹ "[A]n 'area' variance involves a relaxation of a rule governing dimensional or physical requirements affecting a building or a lot, such as a rule limiting the height of a building or setting the minimum size for a rear yard." Robert Andersen & Patricia Salkin, NEW YORK ZONING LAW AND PRACTICE § 29:02 (4th ed. 2002).

⁵⁰ TOWN OF ORCHARD PARK, N.Y., CODE § 144-24(A)(5)(a-c) (2010).

⁵¹ TOWN OF ORCHARD PARK, N.Y., CODE § 144-24(A)(5).

Orchard Park effectively forbid development of backyard wind where it is arguably needed most (denser residential and commercial areas that utilize the most power), it is a decision that makes sense if a municipality anticipates considerable pushback from the community.

Contrary to Orchard Park's approach, the "Accessory wind turbine" subsection of the Town of Islip's zoning code permits wind energy generators in all of the town's residential subdivisions.⁵² Accordingly, because WECS are permitted in medium density residential neighborhoods, Islip's wind turbine-specific "accessory use" provision is more detailed and exhaustive in the number of areas regulated in comparison a code that only allows WECS in less dense agricultural and industrial settings, such as Orchard Park's. When this accessory use provision was enacted in 2008, Islip became the first Long Island municipality to allow construction of wind generation facilities on residential lots.⁵³ Soon afterwards, the Long Island Power Authority (LIPA) introduced a program offering property owners rebates of up to 60% of the turbine's cost of construction.⁵⁴

In the case of Islip, designing a law to allow accessory wind generators throughout the township meant creating a zoning law that would allow the wind turbines to coexist with other features and characteristics of this suburban community. For example, similar to other backyard wind energy zoning statutes, Islip requires applicants "to make reasonable efforts to avoid any disruption or loss of radio, telephone, television or similar signals."⁵⁵ Compared with "signal interference" provisions in other codes,⁵⁶ Islip's statute is a fairly open-ended provision which may result in their town zoning board having greater discretion to determine (1) whether an applicant made "reasonable efforts" to avoid signal interference, and (2) whether any disturbance caused by the turbine is worth the benefits of additional wind power to the neighborhood.

Although accessory use provisions are typically designed to measure a proposed building project by objective means (height limits, decibel limits, etc.), it appears that Islip and other municipalities may still want to maintain to give boards the discretion to decide when the "character of the neighborhood" is threatened by a backyard wind turbine. In Islip's code, this concern is exemplified in provisions

⁵² TOWN OF ISLIP, N.Y., CODE § 68-420.9 (2010) ("In order to accommodate alternative and renewable forms of energy production *across the Town*, while regulating the visual impacts of any such form, accessory wind energy turbines may be allowed as specified.").

⁵³ Jennifer Maloney, *Windmills in the Backyard*, NEWSDAY, Dec. 4, 2008, www.e2sys.com/press/windmillsinthebackyard.pdf.

⁵⁴ Long Island Power Authority (LIPA), LIPA Announces New Backyard Wind Power Program, http://www.lipower.org/newscenter/pr/2009/012209_wind.html (last visited Feb. 21, 2011).

⁵⁵ TOWN OF ISLIP, N.Y., Code §68-420.9(E)(10).

⁵⁶ See, e.g. TOWN OF CAZENOVIA, N.Y. § 165-104(C)(1)(b)(2010) "Individual on-site-use wind energy conversion systems *shall not* be installed in any location where their proximity interferes with existing fixed broadcast, retransmission, or reception antennas for radio, television or wireless phone." Unlike Islip, Cazenovia's zoning statute does not permit the board discretion to decide whether signal interference caused by a residential wind turbine is negligible, insignificant, or potentially mitigated.

regulating a wind generator's shadow flicker, its visual appearance, and the visibility of electronic components necessary to carry electric current from the turbine into the home.⁵⁷ However, unlike a code with special use permit component, the impact on the "character of the neighborhood" itself is not a category up for consideration by the local administrative body. From a safety perspective, the Islip statute provides for backyard and side yard "setbacks" at "a distance greater than the height of the turbine or the highest component thereof" from the nearest shared property line. Thus, applicants interested in building stand alone wind power generation units 45' in height - the maximum height permitted under the ordinance - will need to own more than 45' of property on all sides from the base of the windmill. Property owners in Islip and elsewhere should take note of two possible workarounds for this requirement: (1) owners of adjacent lots could submit an application for one windmill and share the energy created by a single WECS; (2) applicants can apply for area variances when their windmill's height is only marginally beyond the setback line or when the private property is adjacent to publicly owned land. Notably, windmills mounted on rooftops are not subject to the setback rule under the statute, only the height requirement mentioned above.

The Town of Ithaca, NY's municipal zoning code contains a provision declaring that construction of "[s]mall wind facilities are permitted as a matter of right" which – subject to certain limitations involving parkland, nature preserves, and Cayuga Lake – shall be permitted as accessory uses and shall not require an applicant to obtain a special permit.⁵⁸ However, the accessory use requirements of this statute are extensive and require, among other things, that decibel levels emitting from a WECS be no more than 55 dB (A),⁵⁹ that the circumference "fall zone" surrounding the WECS be no less than the structure's height plus an additional 10 ft.,⁶⁰ and that the setback from an adjacent property line be no less than 50 ft.⁶¹ Ithaca's town ordinance also compels property owners to take down a WECS structure that has been inoperative "for more than 12 consecutive months."⁶² In this respect, Ithaca's "discontinuance" provision⁶³ treats WECS facilities that cease to operate similar to "nonconforming uses" or, uses of land permitted to continue only because their existence predates passage of the zoning ordinance that forbids

⁵⁷ TOWN OF ISLIP, N.Y., CODE § 68-420.9(E)(5)-(6)-(9).

⁵⁸ TOWN OF ITHACA, N.Y. CODE §270-219.4(C)(1) (2010).

⁵⁹ §270-219.4 (C)(5).

⁶⁰ §270-219.4 (C)(3).

⁶¹ §270-219.4 (C)(8).

⁶² §270-219.4 (G)(1).

⁶³ This "decommissioning" requirement is echoed in Islip's town ordinance which creates a presumption that "the accessory wind energy turbine [is] at the end of its useful life if no electricity is generated for a continuous period of 12 months" and then requires the structure to be taken down sometime in the following 12 months. TOWN OF ISLIP, N.Y., CODE §68-420.9(E)(11).

their creation.⁶⁴ It is common for zoning ordinances to “stipulate that any discontinuance of [a] nonconforming use for a *specified period* constitutes abandonment” and will result in the property owner losing their right to continue the use.⁶⁵ For example, where a service station operating in a residential district as a “preexisting nonconforming use under [a] Village zoning ordinance” explicitly stating that nonconforming uses which were discontinued for 12 consecutive months would not be renewed, the court held that the village was entitled to forbid reopening of the service station because the defendant property owner “failed to submit proof . . . that gas was actually dispensed as part of an arm's length commercial transaction during the relevant [12 month] time period.”⁶⁶ Traditionally, discontinuance provisions have been reserved for uses of land deemed by the Court of Appeals to be inherently “detrimental to the zoning scheme.”⁶⁷ The fact that Ithaca, Islip, and other locales⁶⁸ have applied similar “discontinuance” provisions to “accessory” wind facilities demonstrates that, even where communities embrace backyard wind development, local officials are highly sensitive to the perceived impact these structures could have on the existing residential landscape.

iii. Special Use Permits

Although uses of land requiring a property owner to obtain a “special use permit” are traditionally subject to more searching scrutiny than uses designated as accessory uses, they are still considered to be “in harmony with the general zoning plan and will not adversely affect the local community.”⁶⁹ Despite the fact that a use allowed to operate under a special use permit signifies that it is generally compatible with other “as of right” uses within a particular zone, a board’s denial of a special use permit application is somewhat easier to defend in court because the special use permit designation also permits application of more subjective standards of review than is allowed with accessory uses or area variances.⁷⁰ Although Article 78 of New York’s CPLR permits applicants to appeal zoning board determinations on special use permit applications, the standard of review is highly deferential to the decision of the administrative body,

⁶⁴ See *People v. Miller*, 304 N.Y. 105, 109, 106 N.E.2d 34, 36 (1952) (holding that existing nonconforming uses will be permitted to continue, despite enactment of a prohibitory zoning ordinance, if enforcement of the ordinance would cause serious financial harm to the property owner by rendering valueless substantial improvements).

⁶⁵ See *NOLON, SALKIN, & GITELMAN*, *supra* note ___, p.239.

⁶⁶ *Vill. of Waterford v. Amna Enters., Inc.*, 27 A.D.3d 1044, 812 N.Y.S.2d 169 (3d Dep’t 2006).

⁶⁷ *P.M.S. Assets, Ltd. v. Zoning Bd. of Appeals of Vill. of Pleasantville*, 98 N.Y.2d 683, 685, 746 N.Y.S.2d 440, 441, 774 N.E.2d 204, 205 (2002).

⁶⁸ See *TOWN OF ALBION*, N.Y., Code §104-13(A) (2010) “A small WECS which is not used for 12 successive months shall be deemed abandoned and shall be dismantled and removed from the property within 24 additional months at the expense of the property owner.”

⁶⁹ See *WEEK Broadcasting Corp. v. Planning Bd. of the Town of Lloyd*, 79 N.Y.2d 373, 383, 583 N.Y.S.2d 170, 174, 592 N.E.2d 778 (1992).

⁷⁰ “In *Barbulean*, local officials were empowered to grant or deny special use permits on the basis of . . . findings on such . . . subjective matters as whether the requested use was “essential or desirable to the public convenience or welfare” and would neither “impair the integrity or character of the zone or adjoining zones nor be detrimental to the health, morals or welfare” *Uhlfelder v. Weinshall*, 47 A.D.3d 169, 178, 845 N.Y.S.2d 41, 48 (1st Dep’t 2007).

requiring only that a particular decision not be “arbitrary and capricious” in that it must be supported by “substantial evidence” on the record.⁷¹ Therefore, ordinances requiring a special use permit for construction of backyard WECS may pose greater difficulty to WECS developers because a small scale wind projects meeting all objective statutory criteria for height, noise, and setback could still be denied a special use permit if there is enough testimony that the project would “interfere with a recognized scenic viewshed,” so long as the local ordinance allowed for consideration of a project’s impact on surrounding aesthetics.⁷²

In designing town ordinances to accommodate and regulate backyard wind projects through the special use permit application process, legislative bodies in New York municipalities have, in several instances, piled on additional application requirements to address the specific challenges posed by small-scale WECS to the surrounding community. For example, the Town of Cazenovia’s zoning ordinance states that “[i]n *addition* to the criteria established pursuant to §165-114,” the town’s general criteria for obtaining a special use permit, “the following criteria are hereby established for purposes of granting a special use permit for an on-site-use wind energy conversion system.” The provision then details additional requirements that would not be applied to other residential uses requiring special use permit approval, such as FAA signal requirements, rotor blade ground clearance (a minimum of 30 ft.), and the presence of an anticlimb device.⁷³ Therefore, applicants for backyard WECS in Cazenovia must abide by the general special use permit requirements contained in §164-144⁷⁴ in addition to meeting the WECS-specific provisions of §165-104.

A notable example of a WECS-specific provision is Cazenovia’s “Public Hearing” requirement, which obligates an applicant to notify “by certified mail, all property owners of record within 500 feet of the outside perimeter of the boundary line of the [applicant’s] property . . . of the time, date and place of such public hearing at least 10 days prior to such hearing” as part of the special use permit application process, in addition to the legal notice that the Zoning Board of Appeals must publish in the local newspaper at least five days before the hearing.⁷⁵ Further, in a provision that speaks to a board’s power to make subjective determinations when reviewing special use permit applications, Cazenovia’s board may impose additional setback requirements “to provide for the public’s safety, health and welfare, including the possibility of ice thrown from the blades” in addition the requirement that a proposed WECS be “set

⁷¹ See *Jackson v. Urban Dev. Corp.*, 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986).

⁷² See, e.g. TOWN OF CAZENOVIA, N.Y. CODE §165-104(C)(1)(c) (2010).

⁷³ See TOWN OF CAZENOVIA, N.Y. CODE §165-104(C).

⁷⁴ See, e.g. “Before granting a major project special use permit, the reviewing board shall make specific written findings that the proposed major project . . . Will not degrade any natural resource, ecosystem or historic resource, including Cazenovia Lake . . . Will have no greater overall impact on the site and its surroundings than would full development of uses of the property permitted by right.” TOWN OF CAZENOVIA, N.Y. CODE §165-114(A)(2)(f)(i).

⁷⁵ TOWN OF CAZENOVIA, N.Y. CODE §165-104(c)(2).

back a distance equal to the height of the tower plus blade length plus an additional 25 feet from all property lines, public roads, power lines and preexisting and future structures.”⁷⁶

In addition to the WECS-specific standards pertaining to structural and spatial requirements, certain localities have also placed formal obligations on applicants to take steps toward building community approval for a special use permit application. For example, within the zoning law of Manchester, NY, small-scale WECS applicants can be required to obtain, under the discretion of the Planning Board, “written and notarized consent of 30% of the owners of real property, as shown on the latest completed assessment roll, within 1,500 feet of the premises, indicating the owners' consent and recommendation of the grant of the [special use] permit to the applicant.”⁷⁷ Furthermore, as part of the required visual environmental assessment form (“visual EAF”), Manchester requires applicants to submit a, “simulated photographic visualization of the site with particular attention to visibility from key viewpoints identified on the visual EAF.”⁷⁸ Rather than promote adoption of small-scale wind, statutory requirements this level of rigor may serve to deter applicants from building backyard structures. This may be partially explained by the fact that Manchester’s ordinance does not appear to distinguish between small-scale, singular turbine projects and large-scale wind “farms.” So while it may not be within the financial means of a single property owner to build community consensus and provide graphic representations of what their WECS system would look like, these requirements likely would not hinder a larger-scale wind farm developer. Individual homeowners interested in constructing WECS in a locality with similarly costly application demands should consider applying for a waiver of such burdensome requirements.

The Village of Naples, NY allows WECS to be built in zones designated as Residential (“R-1”) or Light Industrial (“L-1”) “provided that a special use permit is reviewed and approved by the Planning Board and issued by the [code enforcement officer].”⁷⁹ The Naples wind provisions are emblematic of how a statute that is devoid of WECS-specific criteria can still present challenge and uncertainty for a developer or property owner interested in building a WECS unit. Under Naples’ statutory framework, applicants must present “[a]n analysis of the impact of the special use on adjacent properties, including but not limited to noise, traffic, aesthetics, property values, scenic views, and historic properties or resources.”⁸⁰ Special use permits are issued by the Naples town planning board for either low density residential neighborhoods (“R-1”) or light industrial/ warehouse (“L-1”) districts only after the public has been given opportunity to comment at a public hearing and the applicant demonstrates that the proposed

⁷⁶ TOWN OF CAZENOVIA, N.Y. CODE §165-104(1)(p).

⁷⁷ TOWN OF MANCHESTER, N.Y. CODE §325-44(A)(5)(C)(5) (2010).

⁷⁸ TOWN OF MANCHESTER, N.Y. CODE § 325-44.

⁷⁹ VILL. OF NAPLES, N.Y. CODE §§385-17(D)(3), 21(D)(4) (2010).

⁸⁰ §385-64(B)(5).

use will not cause harm to either the character of the neighborhood or neighborhood property values.⁸¹ As demonstrated by other statutes regulating WECS siting through general special use permit standards, the viability of project proposals for WECS in the Town of Naples may be more susceptible to local opposition or opinions simply because the town planning board is given discretion to make subjective judgments. The takeaway for wind energy companies, developers, and property owners is that in places where the special use permit is the chosen method of regulating WECS siting and the town zoning code authorizes highly subjective criteria to assess WECS applications, the wisest course of action for a wind developer or property owner is to build community support for the project before the administrative review process begins.

iv. SEQRA Review Pursuant to a Special Use Permit Decision

The substantive and procedural requirements established under New York’s State Environmental Quality Review Act (SEQRA) compels property owners, developers and government entities (municipalities, zoning boards, agencies, etc.) to consider the environmental effects of “any actions that are directly undertaken, funded, or *approved by* local, regional, and state agencies.”⁸² Since the definition of an “action” includes projects that “require one or more new or modified approvals from an agency,” applications for small-scale wind projects will likely involve some level of the SEQRA process because these projects must be approved by town zoning or planning boards.⁸³ However, although SEQRA has and will continue to play a significant role in the siting and approval of *wind farms*,⁸⁴ it does not necessarily follow that smaller-scale WECS initiatives will be required to meet identical mandates under the law.

SEQRA regulations delineate two kinds of actions, each requiring their own unique set of step-by-step procedures. “Type I actions” are projects more likely to require the preparation of an Environmental Impact Statement (EIS) because it is likely to have a significant adverse impact on the surrounding environment. A determination that a given action is a “Type I” requires a considerable amount of coordination between a project’s designated “lead agency” (if the project involves multiple agencies) and a determination of the project’s “significance” which will impact whether or not the lead agency must assemble an EIS. Under the NYCRR, the type of actions deemed to be “Type I” and in need of greater scrutiny are large-scale transactions (*e.g.* “the acquisition, sale, lease, annexation or other

⁸¹ §385-64(G).

⁸² 6 NYCRR §614.4(b) (2010).

⁸³ 6 NYCRR § 617.2(b)(1)(iii).

⁸⁴ See Gregory D. Eriksen, *Breaking Wind, Fixing Wind: Facilitating Wind Energy Development in New York*, 60 SYRACUSE L. REV. 189, 194 (2009) (“Since the demise of Article X (which vested considerable siting power for large-scale wind projects at the state level) the principal regulation for wind farm siting has been the State Environmental Quality Review Act (SEQRA) process.”).

transfer of 100 or more contiguous acres of land”) or a significant decision by a local legislative or administrative body impacting a considerable geographic area or number of constituents.⁸⁵ Conversely, a SEQRA Type II action is those which, because of their limited impact on the environment, never require further review under the SEQRA process. Actions listed as “Type I” are deemed “to be more likely to require the preparation of an EIS than Unlisted actions,” while “unlisted” actions are those that cannot be classified as either Type I or Type II actions.⁸⁶ For example, a town board’s approval of a WECS that is classified as an “accessory use,” which also does not require a change of zoning or a use variance, is exempted from SEQRA review.⁸⁷

In addition to complying with the steps required to obtain a special use permit, the Town of Somerset’s wind energy statute requires applicants seeking to build “non-commercial” WECS to “submit a long environmental assessment form (EAF)” when the Town is designated the lead agent for a SEQRA review of a decision regarding a WECS application.⁸⁸ According to DEC, “an action is subject to review under SEQRA “if a permit, license or other type of approval was made with a state or local agency’s discretion.”⁸⁹ EAF’s are used by state and local “involved agencies” to determine the environmental significance of the proposed WECS facility and must be submitted by the applicant in both “Type I” and “unlisted” actions under SEQRA. NYSEDA recommends that New York towns interested in building out significant wind generation capacity to develop a “generic environmental impact statement (GEIS)” which would “indentif[y] [] mitigating measures that would then be implemented through zoning standards, such as setbacks or noise controls” thus “eliminat[ing] the need for SEQRA review of individual proposed wind projects, thereby streamlining the review process”⁹⁰

In 2007, deficiencies in a town board’s SEQRA process sank plans to install a 68 turbine wind project in Jordanville, NY that would have generated an estimated 136 megawatts of electric power.⁹¹ According to the court, the local board’s environmental impact statement did not contain consideration of alternative project sizes and layouts, which to the court evinced that the “lead agency” failed to take a “hard look” at the project’s impact on the surrounding landscape and communities, as required under SEQRA.⁹² In an ongoing battle between a town board in upstate New York and wind developer Ecogen LLC, the board used its role as “lead agency” in compiling the SEQRA EIS. “[T]he board agreed that the

⁸⁵ 6 NYCRR §617.4(b)(1)-(3).

⁸⁶ 6 NYCRR §617.4(b)(1)-(3).

⁸⁷ See 6 NYCRR § 617.5(7).

⁸⁸ Town of Somerset, N.Y. Code

⁸⁹ DEC, Step 1 Classifying the Action, <http://www.dec.ny.gov/permits/6189.html>

⁹⁰ NYSEDA COMPREHENSIVE PLAN REPORT, *supra* note 36, at 5-6.

⁹¹ *Brander v. Town of Warren*, 18 Misc.3d 477, 847 N.Y.S.2d 450 (N.Y. Sup. 2007).

⁹² *Id.*

adverse effects from the wind farm would outweigh the amenities and benefits proposed by [the wind developer].”⁹³

v. Planned Unit Developments (PUDs)

As increasingly strained state and local government budgets struggle to deliver essential public services and maintain existing infrastructure, there is growing recognition that the traditional model of spread out, low-density, suburban development is becoming less economically viable and less commercially desirable.⁹⁴ According to a recent report by the Brookings Institute, “[c]ontinued decentralization of people and jobs away from Upstate New York’s cities and villages is undermining the economic health and quality of life of the region.”⁹⁵ In order to facilitate greater design flexibility and community density, several local legislatures across New York State have adopted “planned unit development” (PUD) provisions into their municipal zoning codes. PUDs allow “the owners of several adjacent parcels [to] apply for a special permit to create a higher density, mixed use development, with considerable design flexibility.”⁹⁶ Through application of more innovative community design techniques, the purpose of PUDs is to facilitate adoption of non-traditional land use approaches to neighborhood and community design. PUD developments are often implemented through “floating zones,” a zoning technique which requires a developer to obtain the approval of the local zoning administrative body to apply cluster development zoning to a selected neighborhood or tract.⁹⁷ Since a primary rationale for PUDs is to promote wider availability of more environmentally sustainable communities, these provisions often include allowance for on-site renewable energy generation, including small-scale WECS. Although certain cluster developments and planned unit developments may permit residential renewable generation facilities, these uses are still subject to administrative review.

The use of PUDs by local governments is authorized in section 261-c of New York’s Town Law, which intended to provide for “residential, commercial, industrial or other land uses, or *a mix thereof*, in which economies of scale [and] creative architectural or planning concepts . . . may be achieved by a developer in furtherance of the town comprehensive plan and zoning local law.” Although this statute

⁹³ Gwen Chamberlain, *Italy Says ‘No’ to Ecogen Wind Farm*, Chron. Express, Oct. 6, 2009, <http://www.chronicle-express.com/news/x1699616236/Italy-says-No-to-Ecogen-Wind-Farm..>

⁹⁴ Gov. David Patterson cited, “[the promotion of] fiscally sound and economically beneficial investments of taxpayer dollars that will help New York survive and thrive in the New Economy,” as the major policy driver behind New York’s new Smart Growth law. Press Release Aug. 31, 2010, *available at* <http://www.smartgrowthamerica.org/2010/09/01/nys-gov-david-paterson-signs-monumental-smart-growth-bill-into-law/>; *See also*

⁹⁵ ROLF PENDALL, CNTR. ON URBAN AND METROPOLITAN PLCY., *SPRAWL WITHOUT GROWTH: THE UPSTATE PARADOX 1* (2003), http://www.brookings.edu/reports/2003/10demographics_pendall.aspx.

⁹⁶ Mathew Mega, Barbara Lukermann and Robet Sykes, *Residential Cluster Development*, UNIV. OF MN – EXTENSION (1998), <http://www.extension.umn.edu/distribution/naturalresources/components/7059-01.html>

⁹⁷ New York State Comm’n on Rural Resources, *A Guide to Planned Unit Development* iii (Fall 2005), *available at* www.dos.state.ny.us/lg/publications/Planned_Unit_Development_Guide.pdf.

does not explicitly list wider adoption of wind power or renewable energy in communities as legislative goals, PUDs could serve as an effective venue to experiment with and demonstrate the advantages smaller-scale wind power. PUD provisions in zoning ordinances represent an opportunity for partnership between wind or real estate developers and local leadership, particularly if a local comprehensive plan aspires to adopt more renewable energy production and there is land available for development not already tapped for green space preservation.

The zoning law of Brighton, NY, a suburban town outside Rochester, authorizes the use of a “Planned Residential Development,” (PRD) a floating zone designation that promotes conservation and more efficient use of land in residential developments.⁹⁸ One of the Town’s stated purposes in enacting the floating zone measure was to encourage the adoption of sustainable practices in the future growth of currently underdeveloped areas of the town. “This section recognizes that [standard zoning controls] . . . represent a type of preregulation, regulatory rigidity and uniformity which may be inimical to the technique of land development contained in cluster development.”⁹⁹ Accordingly, the Town of Brighton designates “[s]olar energy and wind energy collection devices” as a special accessory use available to the residents of the district and subject to the approval of the Brighton Planning Board.¹⁰⁰ Brighton’s zoning code defines “accessory structures” and “accessory uses” which are “detached from a principal building, located on the same lot and customarily incidental and subordinate to the principal building or use.” The implications of this designation are that Brighton exempts wind energy conversation facilities, as “accessory uses,” from site plan review by the town planning board.¹⁰¹

vi. Moratorium

In response to widely publicized controversy and opposition to the siting of wind energy facilities, some New York municipalities and communities throughout the country have enacted temporary moratoriums on the construction of wind turbines in their respective jurisdictions.¹⁰² “A moratorium on development is a local law or ordinance that suspends the right of property owners to obtain development approvals” for a pre-determined amount of time.¹⁰³ Since the New York Court of Appeals has established

⁹⁸ TOWN OF BRIGHTON, N.Y. CODE §203-145(B) (2010).

⁹⁹ TOWN OF BRIGHTON, N.Y. CODE §205-145(C).

¹⁰⁰ TOWN OF BRIGHTON, N.Y. CODE §203-146(B)((4).

¹⁰¹ TOWN OF BRIGHTON, N.Y. CODE §217-8.

¹⁰² See, e.g. Bob Clark, *Hartsville Blocks Wind*, Evening Trib. (Hornell, N.Y.), Feb. 27, 2009, <http://www.eveningtribune.com/news/business/x1959828903/Hartsville-blocks-wind> (reporting that the Hartsville Town Board approved a one-year moratorium on wind power development to assess the impact wind turbines would have on the town); *Emerging Energies, LLP v. Manitowoc County*, No. 2008AP1508, 2009 Wisc. App. LEXIS 149, at *1 (Wis. Ct. App. Mar. 4, 2009) (town enacted moratorium in response to company’s application for conditional use permit to build a seven turbine wind energy system).

¹⁰³ John R. Nolon & Jessica A. Bacher, *Wind Power: An Exploration of Regulation and Litigation* (Feb. 20, 2008), available at digitalcommons.pace.edu/cgi/viewcontent.cgi?article...lawfaculty.

that no zoning ordinance may impose an outright ban on a specific use of property unless it has “substantial relation to public health, safety, morals, or general welfare,”¹⁰⁴ the temporary moratorium has been the preferred method of local governments looking to stymie and delay installation of wind energy generation facilities. The rationales most frequently cited by town councils for moratoriums on wind energy facilities has been to afford the local legislature time to adequately update their respective comprehensive plan or zoning ordinance to accommodate and regulate these new uses and to conduct scientific and economic studies on the impact wind generation facilities will have on the local ecosystem, economy, and quality of life. However, while these may well be legitimate and objective reasons for placing a temporary stoppage on wind energy construction, the fact remains that locally imposed moratoriums on the construction and permitting of wind energy facilities are often instituted to respond to public opposition to a planned wind development. However, it is generally acknowledged that a town’s subjective motivations for a particular zoning decision are irrelevant in determining whether it violates constitutional property rights.¹⁰⁵

One of the most widely cited challenges to a local moratorium on wind energy development is *Ecogen LLC v. Town of Italy, N.Y.*, where a federal district court upheld a town’s two-year moratorium on all construction related to wind power generation.¹⁰⁶ The Italy town board passed the initial moratorium (which was extended several times) after the plaintiff wind development company had acquired property rights and an easement on a hilltop ridgeline to construct a twenty-four turbine wind farm within the town’s borders. Ecogen filed suit, alleging that the “moratorium constituted an arbitrary and unreasonable deprivation of its property rights”¹⁰⁷ and that the project’s delay risked Ecogen losing out on tax credits which were contingent upon the completion of the wind project in the adjoining town of Prattsburgh.¹⁰⁸ While the court acknowledged that the two-year moratorium was an excessively long time to update the town’s zoning code for wind development, the court upheld “protection of aesthetics” as a legitimate public concern justifying the initial moratorium and refused to grant Ecogen’s requested injunction. In 2009, after updating their town zoning ordinance to require wind applicants to obtain a special use permit, Italy’s zoning board again denied Ecogen’s application for a more modestly sized wind farm proposal.¹⁰⁹

Due to the relative newness of backyard WECS technology, the most widely publicized efforts to

¹⁰⁴ *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 107, 378 N.Y.S.2d 672, 341 N.E.2d 236 (1975); In order to prevail in a claim that a land use restriction deprives an owner use of their property without due process of law under the 14th Amendment, a plaintiff must establish that a given restriction bears no rational relationship to any legitimate governmental purpose. *See Ecogen, LLC v. Town of Italy*, 438 F.Supp.2d 149, 156 (W.D.N.Y. 1996).

¹⁰⁵ *Natale v. Town of Ridgefield*, 170 F.3d 258 (2d Cir. 1999).

¹⁰⁶ *Ecogen, LLC*, 438 F.Supp.2d at 149.

¹⁰⁷ *Nolon & Bacher*, *supra* note 39, at 4.

¹⁰⁹ Gwen Chamberlain, *Italy Says ‘No’ to Ecogen Wind Farm*, Chron. Express, Oct. 6, 2009, <http://www.chronicle-express.com/news/x1699616236/Italy-says-No-to-Ecogen-Wind-Farm>.

institute a moratorium on wind development have thus far related to larger-scale wind farms, as opposed to smaller-scale on-site generation systems. However, it is conceivable that wind power opponents may attempt to utilize construction moratoriums in the residential context as well as the commercial context. Aside from the obvious steps of designing and siting WECS to cause as little disturbance (noise, shadow flicker, ice throws) as possible and to conduct outreach with community stakeholders in advance of an installation effort, aspiring small-scale developers should also seek to anticipate administrative inquiries about the impact of a given system that could cause a town board to consider adopting a temporary moratorium on wind development and permitting in a neighborhood or an entire jurisdiction. Including data about noise, shadow flicker, signal disturbance and other community concerns as part of an application should help to alleviate collective community anxiety and provide town leaders with information they will need to justify supporting a controversial wind project.

V. Conclusion

As wind power becomes an increasingly viable source of electric power, towns and municipalities across New York will continue to adapt their local zoning statutes to accommodate and regulate the siting of backyard WECS generators and turbines. As the above survey of existing small-scale WECS laws demonstrates, town councils possess various methods to maintain control over wind turbine development in residential and commercial areas. However, with technology costs likely to come down and government at the state, local and federal level showing increasing interest in promoting clean energy and energy independence, the adoption of wind energy at the community, commercial, and industrial level is likely to proliferate. When considered in light of the expense and bureaucratic complexities of siting large-scale wind farms as well as the multitude of financial incentives now available to small-scale WECS owners, the moment may be right for backyard wind to take hold in the renewable marketplace.

Due to their constitutionally granted power to decide land use and zoning decisions, New York's local governments will continue to play an important role in determining the pace and scope of small scale wind energy adoption. Communities interested in promoting small wind should allow WECS siting to occur under the auspices of the "accessory use" while simultaneously updating their comprehensive plans to reflect a long-term commitment to renewable energy production. Further, communities interested in promoting non-traditional, mixed use development may also want to introduce a "floating zone" similar to Brighton's PUD, which would evaluate small-scale WECS applications as accessory uses to residential property. On the other hand, town councils interested in maintaining discretion over WECS siting should use the special use permit to enable zoning officials to make approval decisions on an applicant-by-applicant basis. In addition to developing a familiarity with local zoning codes and the differing requirements and levels-of-scrutiny associated with each type of zoning classification, small-wind developers and property owners interested in hosting a WECS facility should be mindful that small-

scale wind proposals can become a very political process. Building support among neighbors and the community before beginning the application process can cut costs, alleviate tension, and allow for more productive negotiations among interested parties.