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Expert Analysis

State Authority to Preempt Local Laws Regulating Renewable Energy Projects

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The New York State Energy Plan, announced by Gov. Andrew Cuomo in 2015, calls for a doubling to 50 percent of the portion of the electricity used in the state that comes from renewable sources by 2030. This would lower greenhouse gas emissions, create jobs, and reduce the use of fossil fuels, especially natural gas.

Much of this new renewable energy would be generated by wind and solar projects. Some if it would be from wind facilities to be built offshore in the Atlantic Ocean; the rest would be on the land.

Various federal and state incentives and mandates, as well as declining costs, have induced private developers to propose large onshore wind and solar farms. However, a number of upstate and Long Island municipalities have adopted or are considering local laws that would inhibit this construction, by for example using zoning to restrict where the facilities could be built, imposing onerous setback or other requirements, or barring tree clearing. These local laws are making it more difficult for the state to meet its renewable energy goals.

A state statute, Article X of the Public Service Law, allows the state to override these local laws. This column discusses the history and contents of Article X, the case law under it and its predecessors, and how it can be used to help the construction of renewable energy facilities.

History

Article X has had an on-again, off-again history. The first version (then called Article VIII) was in effect from 1972 through 1989; the second version, from 1992 through 2002; and the third (and current) version took effect in 2011. All three versions were designed to vest most decision-making over new electric power plants in the New York State Board on Electric Generation Siting and the Environment. The Siting Board consists of: the Chair of the Public Service Commission (PSC); the Commissioners of the Departments of Environmental Conservation and of Health; the Chair of the New York State Energy Research and Development Authority; the President and CEO of Empire State Development; and two ad hoc public members who reside within the municipality where the facility would be located. This Siting Board must make its

> Article X of the Public Service Law gives the Siting Board considerable authority to override local laws that are "unreasonably burdensome," though that phrase has not yet been construed by the courts.

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decisions within 12 months of an application being deemed complete. No environmental impact statement is required under the State Environmental Quality Review Act (SEQRA), but the required analysis is often more intense than usually performed under SEQRA.

During the more than eight-year period between the lapse of the second version and the enactment of the third version of Title X, projects were fully subject to SEQRA and required all local permits. Depending largely on the attitudes of the local municipalities and whether there were well-funded opponents, some projects proceeded quickly and others languished or died.

The prior versions applied to generating facilities with a capacity of at least 80 megawatts. The current law applies to facilities of at least 25 megawatts, which means it covers many wind and solar farms. (It does not apply to federally-regulated units—hydroelectric and nuclear—or to on-site generating facilities used exclusively for industrial purposes.)

So far, only one project has been approved under the third version—the 126 megawatt Cassadaga Wind project in Chautauqua County, approved in January 2018. According to the Siting Board's web site, a total of 17 wind, 15 solar, one fossil fuel, and one waste-to-energy project are at various stages in the application process. Several of these projects have been trying for as many as four years to obtain a completeness determination for their applications from the Department of Public Service.

Preemption of Local Control

The first and second versions of Article X authorized the Siting Board to waive local laws it deemed to be "unreasonably restrictive." Using this authority, the Siting Board waived, for example, the height limitations that several municipalities ordinarily impose but that were exceeded by the power plants' smoke stacks. This "unreasonably restrictive" language also appears in another section of the Public Service Law, Article VII, which applies to PSC approval of intrastate electric transmission and pipeline facilities. In several Article VII matters the PSC has waived local height restrictions on transmission towers.

The current version of Article X has similar waiver language, except that it allows the Siting Board to waive local laws that are "unreasonably burdensome" as opposed to "unreasonably restrictive." There have been no decisions explaining the significance of the difference, but "burdensome" arguably extends the Siting Board's power to waive local laws that are so expensive as to render projects uneconomical. As it now stands, the relevant provision (Public Service Law §168(3)(e)), to quote in full, provides that the Siting Board may not approve a project unless:

"the facility is designed to operate in compliance with applicable state and local laws and regulations issued thereunder concerning, among other matters, the environment, public health and safety, all of which shall be binding upon the applicant, except that the board may elect not to apply, in whole or in part, any local ordinance, law, resolution or other action or any regulation issued thereunder or any local standard or requirement, including, but not limited to, those relating to the interconnection to and use of water, electric, sewer, telecommunication, fuel and steam lines in public rights of way, which would be otherwise applicable if it finds that, as applied to the proposed facility, such is unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers whether located inside or outside of such municipality. The board shall provide the municipality an opportunity to present evidence in support of such ordinance, law, resolution, regulation or other local action issued thereunder."

Another pertinent provision is §172, which states that "no … municipality … may, except as expressly authorized under this article by the [Siting Board], require any approval, consent, permit, certificate or other condition for the construction or operation of a major electric generating facility with respect to which an application … has been filed [under Article X]."

Read together, §172 means that local permits are not required, and §168(3)(e) means that the Siting Board will apply the substantive requirements of local laws unless it finds them "unreasonably burdensome." The overall thrust is that the Siting Board is to be the sole permitting authority (except for federal permits, either issued

directly or as delegated to the State Department of Environmental Conservation), but otherwise applicable substantive requirements still apply unless they would unduly interfere with approval and construction.

Case Law

The leading case concerning the Siting Board's power to supersede local laws arose under the first version, when it was called Article VIII. Consolidated Edison Co. announced plans to build a large power plant in the Town of Red Hook, in Dutchess County. The Town swiftly passed a local law requiring a Town permit, and saying the permit could be denied on any of multiple grounds. The Court of Appeals invalidated the local law. It found that the Legislature impliedly preempted local regulation in the field of siting major power plants. It declared that "the history and scope of article VIII, as well as its comprehensive regulatory scheme, evidence the Legislature's desire to pre-empt further regulation in the field of major steam electric generating facility siting, a desire that would be frustrated by laws such as" that enacted by Red Hook. *Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99 (1983).

The statute provides for just a 12-month process after applications are deemed complete, but there is a long queue of projects seeking to have their applications declared complete by the Department of Public Service staff so that the clock can start.

The Appellate Division, Second Department, has twice upheld the PSC's use of the "unreasonably restrictive" language in Article VII to override local requirements. *Skyview Acres Coop. v. PSC*, 163 A.D.2d 600 (2d Dept. 1990) concerned a natural gas pipeline in Rockland County. The Town of Clarkstown's zoning ordinance would not have allowed construction of the pipeline's terminal metering and regulating facility on the site selected by the gas company. The court upheld the PSC's decision to waive compliance with this ordinance, since relocating the facility "would occur only at great expense to [the gas company] and it would delay the completion of the project," and it would also conflict with the Federal Energy Regulatory Commission's determination as to the pipeline's route.

Delaney v. PSC, 123 A.D.2d 861 (2d Dept. 1986), involved a 200-mile-long electric transmission line called the Marcy South line passing through numerous towns in central New York state. The applicant, the Power Authority of the State of New York (PASNY), submitted a 27-page list of local laws that would interfere with the project. The court found that PASNY had the burden of showing that these laws were "unreasonably restrictive," and that PASNY had "overwhelmingly satisfied" this burden. A previous decision by the same court had found that PASNY must operate in compliance with local laws unless they are "unreasonably restrictive." *Koch v. Dyson*, 85 A.D.2d 346 (2d Dept. 1982).

The Second Department has held that Article X does not go so far as to require municipalities to cede their public property for the use of project applicants. *TransGas Energy Sys. v. NY State Bd. on Electric Generation Siting & Env't*, 65 A.D.3d 1247 (2d Dept. 2009), lv. to appeal den., 13 N.Y.3d 715 (2010).

The Appellate Division, Third Department, has rejected claims that the zoning waiver provision of the second version of Article X violates the home rule provisions of the State Constitution, or that the statutory phrase "unreasonably restrictive" is unconstitutionally vague. *Citizens for the Hudson Valley v. NY State Bd. on Electric Generation Siting & Env't*, 281 A.D.2d 89 (3d Dept. 2001).

Conclusion

Article X of the Public Service Law gives the Siting Board considerable authority to override local laws that are "unreasonably burdensome," though that phrase has not yet been construed by the courts. The statute provides for just a 12-month process after applications are deemed complete, but there is a long queue of projects seeking to have their applications declared complete by the Department of Public Service staff so that the clock can start.