



# Minutes & Meeting Procedures for ZBA & Planning Boards

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# Creating Administrative Record

- Trio of Court of Appeals cases in 2002 – municipality afforded “broad discretion,” and its land use decision-making “should be sustained upon judicial review if it has a rational basis and is supported by substantial evidence.”
  - Retail Prop. Trust v. Bd. of Zoning Appeals of Hempstead, 746 N.Y.S.2d 662 (2002) (substantial evidence supported Town’s denial of special permit for mall expansion)
  - Ifrah v. Utschig, 746 N.Y.S.2d 667 (2002) (substantial evidence supported denial of lot area and lot width variances)
  - P.M.S. Assets, LTD. v. Zoning Bd. of Appeals of Pleasantville, 746 N.Y.S.2d 440 (2002) (substantial evidence supported denial of variance)
- All reversed decisions of the Appellate Division, Second Department annulling determinations of local boards



# Creating Administrative Record

- “Deference” owed to land use decisions supported by substantial evidence
  - “Where substantial evidence exists, a court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record.” Retail Prop. Trust v. Bd. of Zoning Appeals of Hempstead, 746 N.Y.S.2d 662 (2002)
- Not “rubber stamp”
  - “A court reviewing the substantiality of the evidence upon which an administrative agency has acted exercises a **genuine judicial function** and does not confirm a determination simply because it was made by such an agency.” 300 Gramatan Avenue Assocs. v. State Div. of Human Rights, 408 N.Y.S.2d 54 (1978)



# Creating Administrative Record

- What constitutes “substantial evidence”?
- **Empirical data establishing pattern of development in community**
  - Campbell v. Town of Mt. Pleasant ZBA, 923 N.Y.S.2d 699 (2d Dep’t 2011) (Applicant presented color-coded tax map showing 78% of properties in neighborhood were substandard; **ZBA cited unidentified “traffic, parking and safety” concerns, and denied application for lot area variance**; Supreme Court ordered ZBA to issue variance because record established that the proposed subdivision creating a substandard lot would not result in an undesirable change to the **overwhelmingly substandard pattern of development** in the neighborhood)
- **Expert opinion backed by verifiable data**
  - Moy v. Town Trustees of Southold, 877 N.Y.S.2d 186 (2d Dep’t 2009) (town consultant’s “vague ‘concerns’” regarding impact of issuing a wetland permit, which was “**devoid of scientific data or analysis,**” was “**insufficient to counter the [applicant’s] expert’s report and testimony**” in support of application)



# Creating Administrative Record

- **Detailed observations of neighborhood conditions**
  - MLB, LLC v. Schmidt, 856 N.Y.S.2d 296 (3d Dep't 2008) (upholding planning board's denial of 3-lot subdivision where "the area's current drainage conditions would be aggravated by the proposed development;" **evidence consisted of neighbors' "personal experience and observations," and opinion of Village Engineer**; "where conflicting inferences may be drawn, it was the **responsibility of the board, not this Court, to weigh the evidence and exercise its discretion**"; "this case presented a close, fact-specific choice of the kind that local boards are uniquely suited to make")
  - Stackhouse v. Planning Bd. of Town of Cortlandt, 801 N.Y.S.2d 242 (Sup. Ct. Westchester Cty. 2005) ("substantial evidence exists to support the Board's finding that the new development would create a safety hazard"; **evidence consisted of "objective and factual documentary evidence supplied to the Board by the engineers, the Town [traffic] consultant and the [Department of Technical Services], as well as the oral and written testimony by neighbors with actual knowledge of the conditions** along Locust Avenue)

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# Creating Administrative Record

- **“Generalized Community Opposition” insufficient**
  - Project opponents should retain own consultants to counter evidence in the Record – need not perform full analyses, but at least need to identify objections in technical manner
  - Bower Assocs. v. Planning Bd. of Pleasant Valley, 735 N.Y.S.2d 806 (2d Dep’t 2001) (directing planning board to approve subdivision application where the “record disclose[d] that the only reason for the Board’s denial of the subdivision application was generalized community opposition”)



# Creating Administrative Record

- **Practical Pointer: Do not rely on boilerplate recitals of statutory language**
  - Necker Pottick, Fox Run Woods Builders Corp. v. Duncan, 673 N.Y.S.2d 740, 741 (2d Dep't 1998) (overturning denial of variance because “the **Zoning Board merely reiterated the prongs of the Town Law § 267-b(3)** balancing test without stating the specific facts or reasons that it relied upon in making its determination to deny the petitioner’s application for a frontage variance”)
  - Margaritis v. Zoning Bd. of Appeals of Flower Hill, 821 N.Y.S.2d 611, 613 (2d Dep't 2006) (overturning ZBA decision because it “**failed to issue specific findings** or reasons that it relied upon in making its determination to grant the variance”)



# Following Precedent

- General rule of administrative law: “A decision of administrative agency which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious.” In re Charles A. Field Delivery Servs. Inc., 489 N.Y.S.2d 111, 113 (1985)
- Board cannot ignore its precedent – when Applicant presents prior cases with “essentially similar” facts, ZBA and Planning Boards reaching different result must distinguish the facts with particularity, *not* “general and conclusory assertions”



# Following Precedent

- Tall Trees Construction Corp. v. ZBA of the Town of Huntington, 735 N.Y.S.2d 873 (2001) (overturning ZBA's denial of variance request to permit flag lot because petitioner presented evidence that ZBA had **previously granted a similar variance application, and there were at least six other flag lots in neighborhood**; thus, the **Board's failure to refute petitioner's expert report and empirical data establishing flag lot's consistency with neighborhood resulted in arbitrary and capricious denial of application**)
- Lucas v. Bd. of App. of Mamaroneck, 836 N.Y.S.2d 486 (Sup. Ct. Westchester Co. 2007) (overturning ZBA's decision to deviate from prior precedent because if **failed to present evidence establishing either a (i) "material change in circumstances" or (ii) a substantive difference between applications**)



# Following Precedent

- If agency can provide rational explanation – supported by objective factual basis – it may reach a different result on “essentially the same facts” Knigh t v. Amelkin, 510 N.Y.S.2d 550, 551 (1986) (applying rule to ZBA decision-making)
  - Cowan v. Kern, 394 N.Y.S.2d 579, 581-83 (1977) (**ZBA not “bound to perpetuate prior error”**; evidence of changed circumstances or the realization that the prior awards had imposed too great a burden and strain on existing community constitutes a rational basis to reverse precedent)
  - Layne v. Eastchester Planning Board, 918 N.Y.S.2d 389 (Sup. Ct. Westchester Co. 2008) (recognizing that Planning Boards “are **free to correct prior erroneous interpretations of law or depart from previously stated policies**” so long as they provide “**rational explanation**”)



# Following Precedent

- What constitutes rational basis to deviate from prior precedent?
  - **Change in community character since prior decision** – Lucas, 836 N.Y.S.2d at 486 (overturning ZBA’s determination to deviate from its established policy to maintain the historic and aesthetic character of the neighborhood created by the architectural styles and set backs common to most houses in neighborhood because there was no evidence that this character had changed)
  - **Change in governing law, or agency’s interpretation of law** – Knight, 510 N.Y.S.2d at 550 (requiring ZBA to articulate its reasoning for changing the interpretation of a zoning provision before deviating from its prior application to applications with similar facts)
  - **Differences between uses proposed in subsequent application** – Id. (noting that if ZBA could articulate a difference between the uses proposed in prior applications, then its denial of instant application could be justified)



# Board Members’ “Pre-Judgment” or “Bias

- Issue: when does a predisposition about a project, or even public comments, render a Board Member unable to participate in review?
- Stems from GML §§ 800 et. seq., which prohibits “conflicts of interest” by municipal officials related to financial interests in project
  - “Interest” defined as “***direct or indirect pecuniary or material benefit*** accruing to a municipal officer or employee as the result of a contract with the municipality which such officer or employee serves.”



# Board Members’ “Pre-Judgment” or “Bias

- **Recusal required where Board member has substantial, direct personal interest in vote. N.Y. Att’y Gen. Inf. Op. 2002-9.**
  - Living in Business Improvement District for which Board was considering raising taxes may be sufficient for recusal. Id.
  - Owning property neighboring potential development and testifying in opposition to project required recusal. N.Y. Att’y Gen. Inf. Op. 93-6.
  - Being a member of homeowner’s association opposing project was not enough to require recusal. N.Y. Att’y Gen. Inf. Op. 88-60.
  - Home contractor should not serve as assessor in town where he builds homes. N.Y. Att’y Gen. Inf. Op. 84-11.



# Board Members’ “Pre-Judgment” or “Bias”

- Courts hesitant to overturn decisions unless Record reflects Board Member possessed illegal **pecuniary** “interest”:
  - General allegations of bias not enough
    - Segalla v. Planning Bd. of the Town of Amenia, 611 N.Y.S.2d 287 (2d Dep’t 1994) (during public hearing on plan to include floating zone permitting mining, town resident voiced “strong[ly]” opposition to zone; same resident was then appointed to Planning Board, and voted against zone. Court finds that resident’s **public comments do not create illegal conflict because the alleged bias “involved only personal opinion rather than any financial interest”**)
  - Employees of Applicant serving as Board Members
    - De Paolo v. Town of Ithaca, 694 N.Y.S.2d 235 (3rd Dep’t 1999) (invalidation of decision was not required where board members were employees of Applicant university, but **employment responsibilities did not involve the subject project and their remuneration would not be directly affected by project**)



# Board Members’ “Pre-Judgment” or “Bias”

- **Some Courts consider expressions of personal opinion as proof of illegal conflict or an impermissible “prejudgment” of an application under Article 78:**
  - Schweichler v. Vill. of Caledonia, 845 N.Y.S.2d 901, 904 (4th Dep’t 2007) (“Actual bias” and “illegal prejudgment” of Planning Board Chairperson was shown **requiring annulment of decision where Chairman wrote a letter to the Mayor in support of rezoning** and project listing personal reasons, and signed petition in favor of project).



# Board Members’ “Pre-Judgment” or “Bias”

- Also, potential Due Process claim of bias where Record reflects inability of Board Member to make unbiased evaluation of application:
  - Warder v. Bd. of Regents of Univ. of State of N.Y., 440 N.Y.S.2d 875 (1981) (stating applicant is “**constitutionally entitled**” to “**dispassionate review of facts**;” despite Board Member’s expression of strong opposition to approving charter for religious educational institution during public hearings, record reflected that Board Member considered all the evidence and arrived at a reasoned decision based on the record)
  - Washington County Cease, Inc. v. Persico, 473 N.Y.S.2d 610 (3rd Dep’t 1984) (holding that “[i]t is beyond cavil that an applicant before an administrative agency is **constitutionally entitled to unprejudiced decision making**;” finding that Member of Industrial Hazardous Waste Facility Siting Board, who also served as General Counsel to DEC, could not participate in DEC application before the Board as a matter of due process).



# E-mails and FOIL

- Presumption of access under FOIL
- Section 86(4) of Public Officers Law defines the term “record” to include “any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in **any physical form whatsoever** including, but not limited to . . . **computer tapes or discs . . . .**”



# E-mails and FOIL

- NYS Committee on Open Government has stated that **“documentary materials need not be in the physical possession of an agency**, such as a town, to constitute agency records; so long as they are produced, kept or filed for an agency, the law specifies and the courts have held that they constitute ‘agency records’, even if they are maintained apart from an agency’s premises.” FOIL-AO-16103 (August 9, 2006)
- The definition of the term “record” makes clear that **email communications** made or received by government officers and employees **fall within the scope of the Freedom of Information Law. Id.**



# E-mails and FOIL

- “Information is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form.” Babigian v. Evans, 427 N.Y.S.2d 688, 691 (1980); see also Szikszay v. Buelow, 436 N.Y.S.2d 558 (1981).
- See also NYS Committee on Open Government, FOIL-AO-13444 (July 10, 2002) (“In short, email maintained on the County’s computers, based on judicial decisions rendered by the state’s highest court, clearly in my view constitute County records subject to rights of access conferred by the Freedom of Information Law.”)
- The NYS Committee on Open Government has also opined that **emails stored on a home computer are subject to FOIL**
  - “communications would be subject to rights granted by the Freedom of Information Law even if they are stored in a Town official’s home computer.” FOIL-AO-16103 (August 9, 2006)



# Communications between Applicants' Attorney and Board Members

- **Rule 4.2 of New York Rules of Professional Conduct: “No Contact Rule”**
  - “In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.”
  - Previously DR 7-104(A)(1)



# Communications between Applicants' Attorney and Board Members

- Ethics Opinion 812 (May 3, 2007), issued by NYS Bar Association Committee on Professional Ethics, addresses communications by an Applicant's attorney with individual Planning Board Members
  - Individual Planning Board Member is a "party" under Rule 4.2, because they are "invested with the power to issue binding SEQRA, site plan and subdivision determinations"
  - Nonetheless, communications between an Applicant's attorney and a Planning Board Member are "**authorized by law**"
  - **First Amendment right to petition government**



# Communications between Applicants' Attorney and Board Members

- Planning Board – communications **permitted** with Board members “about pending SEQRA, site plan and subdivision determinations **provided**: (a) the proposed communications solely concern municipal development policy issues; and (b) the **lawyer gives planning board counsel reasonable advance notice** of the proposed communications”
- Such communications may implicate a **locally adopted ethics code**
- Attorney “should **cease contact** with a planning board member if the member so requests.”



# Communications between Applicants' Attorney and Board Members

- ZBA – Opinion 812 expressly states that it does not “address ex parte communications with an **adjudicatory body**, such as a zoning board of appeals, which present different considerations”
  - ZBA is generally recognized, however, as “**quasi-administrative**” rather than quasi-judicial
  - Communications **should be permitted**, subject to same caveats above
- Municipal engineers, planners and consultants – Opinion 812 does not address communications with municipal staff
  - Staff members appear not covered as “parties” under Rule 4.2 because they **do not have the ability to bind** the municipality
  - Communications **should be permitted, without the need to provide counsel with advance notice**



# SEQRA Determination: Negative Declaration or EIS?

- Determination of Significance required within 20 days of establishment of Lead Agency, or within 20 days of receipt of “all information it may reasonably need to make the determination of significance, whichever occurs later.” 6 N.Y.C.R.R. § 617.6(b)(3)(ii).
- Proper SEQRA determination for some Unlisted Actions not always apparent
  - More clear for projects involving environmentally sensitive properties, or smaller projects not involving environmental features
- Public Hearing not required before Determination of Significance
- Many municipalities wait to issue Negative Declaration until the same night as approval
- Applicant may be led to believe it is pursuing a Negative Declaration, but Board retains right to issue Positive Declaration at any time



# SEQRA Determination: Negative Declaration or EIS?

- **Potential for “endless environmental review”** – uncertainty for all parties
- **Practical Pointer:** Sometimes more efficient for both the Applicant and Board when an Application is processed within the formal EIS process (*i.e.*, scoping, DEIS hearing, FEIS, Findings, etc.), with established timeframes.
  - Decide as early as possible, taking into account that expanded EAF Part 3 may sometimes resemble a “focused EIS”
  - Focused EIS – purpose of scoping is to “eliminate consideration of those impacts that are irrelevant or non-significant” 6 N.Y.C.R.R. § 617.8(a).
  - More likely to defeat a “hard look” challenge – factor potential litigation



# SEQRA Review between DEIS and FEIS

- Lead agency must respond to “substantive comments” received on a DEIS. 6 N.Y.C.R.R. § 617.9 (b)(8)
- **FEIS is the Lead Agency’s document**
  - “The lead agency is responsible for the adequacy and accuracy of the final EIS, regardless of who prepares it.” 6 N.Y.C.R.R. § 617.9(b)(8)
- No requirement for Public Hearing
  - “A hearing on a final EIS would actually run counter to the intent of SEQRA, in that a final EIS is intended to serve as the conclusion of the lead agency’s environmental review of the proposed project.” The SEQRA Handbook, 3rd Ed. (2010), at 137.



# SEQRA Review between DEIS and FEIS

- “In determining whether comments received are ‘substantive’, the lead agency should assess the relevance of the comments to identified impacts, alternatives and mitigation, or whether the comments raise important, new environmental issues, not previously addressed. The lead agency may also choose to use its responses to comments as an opportunity to explain why an impact is not significant, why a particular topic is not included in the final EIS, or how an alternative or proposed mitigation would work.” Id. at 139.
  - “Speculative comments, or assertions that are not supported by reasonable observations or data, need no response.” Id.



# SEQRA Review between DEIS and FEIS

- **Projects may change between DEIS and FEIS as a result of Public Comment, different objectives of Applicant, etc.**
  - “Indeed, what better example of the requisite ‘hard look’ is there than the incorporation in the FEIS and adoption by the [Lead Agency] of alternatives developed as a direct result of the review process?” Coalition for Responsible Planning, Inc. v. Koch, 543 N.Y.S.2d 653 (1<sup>st</sup> Dep’t 1989) (holding that a **supplemental EIS was not required** where “the review procedure actually resulted in a smaller number of residential units,” in response to the “virtually unanimous opposition” to the project during the DEIS Hearing)
  - Supplemental EIS required, however, for **significant adverse impacts which were not addressed in an EIS due to “changes proposed for the project” or “newly discovered information.”** 6 N.Y.C.R.R. § 617.9(a)(7)
    - “A lead agency may require a supplemental EIS at any time during the review of an EIS.” The SEQRA Handbook at 142.



# Processing Applications Requiring PB and ZBA Approvals

- **Town Law § 277(6)** – “[W]here a plat contains one or more lots which do not comply with the zoning regulations, application may be made to the zoning board of appeals for an area variance [pursuant to Town Law Section 267-b], **without the necessity of a decision or determination of an administrative official** charged with the enforcement of the zoning regulations. In reviewing such application the zoning board of appeals shall request the planning board to provide a written recommendation concerning the proposed variance.”
- **Town Law §274-a(3)** – “Notwithstanding any provision of law to the contrary, where a proposed site plan contains one or more features which do not comply with the zoning regulations, application may be made to the zoning board of appeals for an area variance pursuant to section two hundred sixty-seven-b of this article, **without the necessity of a decision or determination of an administrative official** charged with the enforcement of the zoning regulations.”

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# Processing Applications Requiring PB and ZBA Approvals

- “Separation of Powers” between PB and ZBA
  - Marx v. Zoning Bd. of Appeals of Mill Neck, 529 N.Y.S.2d 330 (2d Dep’t 1988) (holding that the ZBA lacked jurisdiction to modify conditions imposed by Planning Board; “The purposes and powers of a Zoning Board of Appeals and of a Planning Board are distinct and separate.”)
- Practical issues:
  - Should Applicant first appear before PB for “conceptual” presentation, and request/obtain PB recommendation?
    - Informal Public Hearing/public comment? Joint meeting?
    - Need meaningful and clear recommendation
    - Avoid “ping pong” Application
  - PB and ZBA should utilize same Consultants



# Processing Applications Requiring PB and ZBA Approvals

- Integration with SEQRA
  - **PB, as Lead Agency, must complete SEQRA before ZBA issues variances**
    - ZBA involved agency
    - ZBA “straw poll”
  - **Unless, Variance Application is Type II** under SEQRA
    - “individual setback and lot line variances” 6 N.Y.C.R.R. § 617.5(12)
    - “area variances for single-family . . . residence” 6 N.Y.C.R.R. § 617.5(13)
  - Issue in major projects: segmentation?



# Processing Applications Requiring PB and ZBA Approvals

- Deon v. Town of Brookhaven, 824 N.Y.S.2d 768 (Sup. Ct. Suffolk Cty. 2006)
  - 2-lot subdivision proposal involved a 14,367 sq. ft. lot, which would not meet the 20,000 sq. ft. minimum requirement
  - Town Board had adopted a Code amendment prohibiting the ZBA from acting on variances for minor subdivisions until the Planning Board made a determination on the subdivision application
  - Court held that Town Board could not lawfully “reverse the process between the Zoning Board of Appeals and the Planning Board, requiring the Planning Board to render it’s determination of an application containing requests for relief that require variances, first, when, **by law, it is required to turn down the application because it does not comply with the town zoning code**, thus depriving the Zoning Board of Appeals its exclusive jurisdiction to determine the issue of granting variance, with recommendations of the Planning Board, only, as per Town Law § 277(6).”
  - Such “reversal of process . . . directly violates the very purpose of the requirement for a ZBA.”



# Processing Applications Requiring PB and ZBA Approvals

- North Country Citizens for Responsible Growth v. Town of Potsdam Planning Board, 834 N.Y.S.2d 568 (3d Dep't 2007) (noting that Wal-Mart obtained a setback variance from the ZBA for its site plan application for a supercenter after the Planning Board issued SEQRA Findings, and the **Planning Board granted site plan approval the day after the variance was granted**).



# Use Variance or Rezoning?

- Issue: When a landowner wants to use its property in a manner not allowed under zoning, should the landowner pursue a zoning change from the legislative body, or a use variance from the ZBA?
- **High burden** to obtain use variance
  - Four-factor test under Town Law § 267-b(2)(b):
    1. The property cannot yield a reasonable return if used only for permitted purposes as currently zoned;
    2. The hardship resulted from unique characteristics of the property;
    3. The proposed use would not alter the character of the neighborhood; and
    4. The alleged hardship was not self-created.



# Use Variance or Rezoning?

- Westbury Laundromat Inc. v. Mammina, 879 N.Y.S.2d 188, 191-92 (2d Dep't 2009) (denying variance because applicant did not demonstrate through “**dollars and cents**” **proof** that no reasonable return could be obtained under current zoning)
- “Proof of uniqueness must be ‘peculiar to and inherent in the particular zoning lot’ rather than common to the whole neighborhood.” Vomero v. City of New York, 892 N.Y.S.2d 894 (2009) (overturning use variance because the lot shared similar hardships to other lots in the district, which were not wholly unique to the parcel; all lots were located along major roadway)



# Use Variance or Rezoning?

- Rezoning petition typically requires referral to Planning Board for review and recommendation under local codes
- Potential for rezoning petition to become politicized
- Practical pointer: Case-by-case analysis. Landowner advised to meet first with municipal officials, staff and counsel to present proposal and try to agree upon mutually acceptable approach. Landowner could also meet first with community to gauge potential support or opposition.



# Referral to County Planning under GML Section 239

- **GML § 239-m**
  - Referral required for, among other things, “approval of site plans,” “issuance of special use permits,” and “granting of use or area variances”
- **GML § 239-m**
  - Referral required for subdivision plats
- Application must apply to property within 500 feet of, among other things:
  - Municipal boundary
  - County or State park
  - County or State right-of-way



# Referral to County Planning under GML Section 239

- Must refer “completed EAF and all other materials required by such referring body in order to make its determination of significance.” GML § 239-m(1)(c)
- Lead Agency must also provide the County with the Draft EIS and Notice of Public Hearing under SEQRA
- As a practical matter, Lead Agency should also provide the County with such other information as it deems appropriate to keep the County informed of Project changes, and to solicit feedback throughout the review process



## Referral to County Planning under GML Section 239

- County Planning has 30 days to issue Report
  - Compatibility of various land uses, traffic, community character, drainage, etc. GML § 239-1(2)
- Supermajority vote required if recommendation of modification or disapproval
  - Aloya v. Planning Bd. of Stony Point, 646 N.Y.S.2d 375 (2d Dep't 1996) (subdivision application deemed denied when, after Rockland County Planning Board issued a recommendation disapproving the final plat, the Planning Board "could not muster five votes in favor" of the application as required by the GML)
- Westchester County Code § 277.61 – does not require supermajority vote, only a "Resolution" by the Planning Board
  - See Bloom v. Town Bd. of Yorktown, 436 N.Y.S.2d 355 (2d Dep't 1981) (Westchester County Code provisions govern over GML provisions)



# Pre-Meeting Submission/Reviews

- Encourage or require Pre-Application Meetings
- Early identification of technical issues, and potential community/political opposition
- Inform Applicants of similar applications so they can assess anticipated review process
- Require submissions far enough in advance so that Board's consultants have time to review and issue comments, and Applicant may review and/or revise plans



# Pre-Meeting Submission/Reviews

- Inefficient when Applicant learns of comments close to meeting
- Works both ways: Boards must carefully review submissions, and Applicants must meaningfully respond to comments
- Possible consultant-to-consultant meeting(s) before Board appearances
- Judgment call – at some point, such as when an Applicant sufficiently responds to comments or a specific disagreement arises between Consultants, the Application should be placed on a meeting agenda for discussion
- Practical Pointer – Board should be made aware periodically of project revisions and studies being performed by Applicant to confirm that the Board's Consultants are providing proper guidance and direction



# Consultants' Review Fees

- **SEQRA – 6 N.Y.C.R.R. § 617.13**
  - “lead agency may charge a fee to the applicant in order to recover the actual costs of either preparing or reviewing the draft and/or final EIS”
  - “no fee may be charged for preparation of an EAF or determination of significance”
  - Maximum fee is based upon percentage of total project value, as calculated under SEQRA’s regulations
- Escrow Agreements to govern reimbursement



# Consultants' Review Fees

- Municipal Provisions – Examples:
  - Village of Dobbs Ferry § 300-16
  - Town of Somers § 133-1
    - “The Town Board, the Planning Board, the Conservation Board or the Zoning Board of Appeals, in the review of any application, may refer any such application presented to it to such engineering, planning, legal, technical or environmental consultant or professional(s) employed by the town, as such Board shall deem **reasonably necessary** to enable it to review such application as required by law.”



# Consultants' Review Fees

- Governed by standard of reasonableness: fees charged must be “**reasonably necessary** to the accomplishment of the regulatory program.” Twin Lakes Development Corp. v. Town of Monroe, 769 N.Y.S.2d 445 (2003) (upholding fee schedule in Town Code requiring applicant to pay for Town’s consultants’ fees incurred during subdivision review)
- What measures lead a Court to find fee provision reasonable?
  - Applicant pays same rate charged to Town by consultant (Twin Lakes, 769 N.Y.S.2d at 451)
  - Audit provisions permitting Town to reject charges it deems excessive or unnecessary (Id.).
  - Applicant permitted to audit invoices (Id.)



# Site Visits and Public Attendance

- Issue: Must the public be permitted to attend Site Visits under Open Meetings Law? No.
- Riverkeeper v. Planning Board of Somers, Index No. 10222/02 (Sup. Ct. Westchester Co. 2002) (Lange, J.)
  - Riverkeeper claimed that Site Visit constituted a “meeting” under Open Meetings Law Section 103(a), and that it should be allowed to attend
  - Developer argued not a “meeting” because it is conducted on weekend mornings, whether or not a quorum is present, no attendance is taken, and no minutes are taken
  - Planning Board did not object to public attendance, but claimed it cannot require such attendance, citing landowner liability and insurance concerns
  - Lower Court ruled that Site Visits are not subject to Open Meetings Law
  - Only for “**observation and acquiring information**”; not official business
  - Cited City of New Rochelle v. PSC, 541 N.Y.S.2d 49 (2d Dep’t 1989) (tour of site for power line provided PSC with “greater understanding” of the evidence, and a summary of the tour was made public)



# Site Visits and Public Attendance

- NYS Committee on Open Government OML-AO-3179 (July 5, 2000) (citing City of New Rochelle, and stating that “based upon the Court’s conclusion, a site visit or tour by a public body, particularly on private property, would apparently not constitute a meeting”; advising, however, that “**any discussions or deliberations regarding such observations [at a site visit] should occur in public** during meetings conducted in accordance with the Open Meetings Law”)
- Possible different interpretation of Open Meetings Law
  - § 100 – “public business to be performed in open and public manner”
  - Open Meetings Law was enacted to ensure “the performance of public business in an open and public manner with the public able to attend and listen to the deliberations and decisions that go into the making of public policy.” Matter of Sciolino v. Ryan, 440 N.Y.S.2d 795 (4th Dept. 1981)



# Site Visits and Public Attendance

- Issue not decided by Court of Appeals
- Impractical to avoid “discussions or deliberations” at a Site Visit
- Some municipalities conduct separate Site Visits to avoid quorum (i.e., 2 members at a time)
  
- Practical Pointer: Usually good practice for Applicant to invite neighbors – Boards should encourage
  - Opportunity to explain Project
  - Enhance Administrative Record
  - Cannot be accused of “secret” meetings or deliberations
  - Boards typically cite Site Visits in Resolutions as part of the “hard look”



# Site Visits and Public Attendance

- Practical Pointer: Orchestrating the Site Visit
  - Announce any safety concerns
  - Poster boards showing site plans, etc.
  - Organized tour rather than persons walking in different directions
  - Applicant should have enough representatives present when Site Visit inevitably break off into smaller groups
  - **Who to invite?**
- Practical Pointer: Boards should summarize observations from Site Visit at next public meeting, regardless of whether the public attended



# Requirements for Meeting Minutes

- Governed by New York Public Officers Law § 106
  - “Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.”
  - “Minutes shall be **taken at executive sessions of any action that is taken by formal vote** . . . however, that such summary need not include any matter which is not required to be made public.”
  - “Minutes of meetings of all public bodies shall be available to the public . . . within **two weeks** from the date of such meeting except that minutes taken [at an executive session] shall be available to the public within **one week** from the date of the executive session.”



# Requirements for Meeting Minutes

- Statute does **not require a verbatim account** of what is said at meetings, although at times the use of a stenographer or other method to record the full transcript is beneficial to the Board and/or Applicant
- NYS Committee on Open Government AO 2872 – even when meeting is tape recorded, minutes should be reduced to writing to create a permanent record
- Local codes may have more specific requirements for keeping minutes
- Practical pointer: Many municipalities review draft minutes and formally vote to adopt them at a subsequent meeting. If the public requests minutes before they are adopted, the minutes should be released nonetheless and marked as “draft” or “non-final” to comply with Public Officers Law.