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## **What Every Land Use Lawyer Should Know About the Emerging Use of Health Impact Assessment and Land Use Decision Making**

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### **Recommended Citation**

13(6) N.Y. Zoning and Planning L. Rep. 1 (May/June 2013)

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# NEW YORK ZONING LAW AND PRACTICE REPORT

## WHAT EVERY LAND USE LAWYER SHOULD KNOW ABOUT THE EMERGING USE OF HEALTH IMPACT ASSESSMENT AND LAND USE DECISION MAKING

By Pamela Ko\* and Patricia Salkin\*\*

*The field of Health Impact Assessment is relatively new to the United States, but already a number of state and local governments are incorporating these assessments into land use planning and decision making. In five years, the use of HIA in the U.S. has increased dramatically, with more than 100 HIAs completed or in progress in the U.S. from 2007 to 2010. This article provides a brief overview of HIA in the United States, describes how it is being used in other states with respect to land use decision making, and examines how HIA is starting to be incorporated into traditional land use and environmental decision making in New York.*

### I. INTRODUCTION

Health impact assessment (HIA) is most commonly defined as a “combination of procedures, methods and tools by which a policy, program or project may be judged as to its potential effects on the health of a population, and the distribution of those effects within the population.”<sup>1</sup> At its heart, HIA is a systematic process that uses an array of data sources and analytic methods while considering input from stakeholders to determine the potential effects of a proposed policy, plan, program, or project.<sup>2</sup> HIA can also provide recommendations and guidelines on monitoring and managing those effects. More specifically, HIA is a process aimed at evaluating the positive and negative human health effects of a proposal, development plan or policy, including unintended consequences on overall health, in order to inform the decision-making process. While most HIAs are prospective—carried out before final approval of a proposed project or policy

MAY/JUNE | VOL. 13 | NO. 6

#### In This Issue

**What Every Land Use Lawyer  
Should Know About the Emerging  
Use of Health Impact Assessment  
and Land Use Decision Making ..... 1**

I. Introduction ..... 1

II. HIA and Zoning—  
National Examples ..... 3

III. HIA Makes Its Way  
to New York ..... 6

IV. Conclusion ..... 8

**RECENT CASES ..... 10**

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is obtained in order to provide the most benefit and to mitigate, if possible, potential negative effects before such approval—HIAs can be undertaken concurrently or even retrospectively, in order to furnish information and evidence for future HIAs.<sup>3</sup>

A primary aim of HIA is to evaluate available data related to the topic of the HIA and to provide evidence-based recommendations to modify, if necessary, the proposed project or policy while attempting to limit negative effects and reduce impacts on health inequalities. A secondary aim is to raise overall awareness among decision-makers about the effects projects and policies have on health. Ultimately, HIA adds value to the decision-making process by focusing the analysis on a proposal's effects on nonhealth sectors such as economic, housing, law and order, transportation, and energy that can have the greatest potential impact on the health of a population.<sup>4</sup>

Traditionally, HIA includes five major stages: screening, scoping, assessment, reporting (often referred to as decision making), and implementation and monitoring of the proposed action.<sup>5</sup> The initial screening stage is used to determine the value and purpose of the HIA, focusing on issues of feasibility and the capability of the HIA to add value to the discussions regarding the land use decision. The scoping phase is designed to identify health issues, research methods, and to determine how the population(s) will likely be affected by the health outcomes of the proposed action. Assessment involves establishing baseline conditions, impacts, alternatives, and mitigation for the proposed action in order to report and evaluate the likely health outcomes, such as unnec-

essary exposure to air pollution and particulate matter, and their effects, such as increased respiratory disease and asthma, on the targeted population(s). It should also clearly identify who may be affected and how they will be affected. Assessing the available information, research and resources will allow the HIA practitioners to evaluate risks and benefits in light of the specific details of the individual HIA and better characterize the nature and magnitude of risks and benefits.

During the reporting or decision-making phase, the findings and recommendations from the HIA are developed in such a way that health-based recommendations can be made to aid the decision-making process with respect to the proposed action. Recommendations typically include a viable plan for implementation, in which the involvement and input from the various stakeholders in the process is crucial. Finally, the monitoring phase allows for continuing evaluation of the subject of the HIA by engaged stakeholders and others involved to track outcomes of a decision and its implementation.

Today, HIA can be a useful tool for identifying the potential impact of a new land-use or environmental policy, proposed legislation, or major development project on human health. The 2011 National Research Council report *Improving Health in the United States: The Role of Health Impact Assessment*, cosponsored by the Center for Disease Control, found that HIA “holds promise for incorporating aspects of health into decision-making because of its applicability to a broad array of policies, programs, plans, and projects.”<sup>6</sup> The consideration of evidence related to adverse and beneficial health effects as well as the ability to consider and incorporate various types of mitigation strategies while engaging the affected communities and stakeholders in a deliberative process has led to a call for the expanding use of HIA in the United States.

HIA differs from a public health assessment, a health risk assessment, or an environmental impact assessment in that HIAs are intended to inform deliberations and decision-making on a specific proposal such as legislation, proposed rulemaking, or project permitting. HIAs systematically assess the multiple influences on health that can occur as a result of social, economic, and environmental changes and use a broad definition of health that includes physical and psychological health and general well-being.

In some respects, HIA resembles the familiar environmental impact assessment (EIA) required under New York's State Environmental Quality Review Act (SEQRA). There are, however, fundamental differences.

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**New York Zoning Law and Practice Report** (USPS# pending) is issued bimonthly, six times per year; published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Application to mail at Periodical rate is pending at St. Paul, MN. POSTMASTER: Send address changes to New York Zoning Law and Practice Report, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

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While the EIA process could address health impacts, its purpose is more narrowly directed at other environmental concerns as it generally outlines, among other things, the purpose and need of the project, possible alternatives to the project, and the environmental effects of the projects. While some have argued that HIA should be a part of EIA, empirical research has shown that EIA practice and documentation has consistently lacked adequate coverage of health considerations and only occasionally has addressed health impacts.<sup>7</sup> The National Research Council report also indicated that several factors, including the lack of focus of early legal claims on human health as well as misinterpretation of case law and a lack of involvement by health-related agencies, contributed to the de-emphasis of human health in EIAs.<sup>8</sup>

## II. HIA AND ZONING—NATIONAL EXAMPLES

In the United States, HIA was first used in 1999 to evaluate a policy calling for an increase in minimum wage in California.<sup>9</sup> Since that date, most HIA work has focused on policies and programs typically associated with land-use, zoning and housing and transportation planning.<sup>10</sup> A number of HIAs recently conducted in the U.S. have analyzed either changes to zoning ordinances or comprehensive plans, such as the TransForm Baltimore HIA, or have evaluated the specific health outcomes of redevelopment projects, such as the Jack London Gateway HIA.

An HIA was also conducted to evaluate a proposed plan for development in El Cerrito and Richmond, California to analyze the possible inclusion of affordable housing sites with other land uses. Prior to the completion of the HIA, land use planning agencies had not determined specific sites for affordable housing nor the percentage and type of affordable housing at any site. Following the release of the HIA, a letter from the participants to the City Council and city staff discussed the health-based recommendations and inclusion of affordable housing sites is now being considered.

### CALIFORNIA

The Eastern Neighborhoods Community Health Impact Assessment (ENCHIA) project was created to explicitly understand and articulate how San Francisco land use development could promote and protect health.<sup>11</sup> Completed by the San Francisco Department of Public Health (SFDPH), the goals of the ENCHIA were to identify and analyze the likely impacts of land use plans and zoning controls on community concerns, including housing, jobs, and public infrastructure and to provide rec-

ommendations for land use policies and zoning controls that promoted community priorities while promoting consensus in land use policymaking. The Eastern Neighborhoods Development Plan also required that a Draft Environmental Impact Review (DEIR) be completed. The DEIR specifically referenced the 18-month-long HIA study, and acknowledged that the ENCHIA explicitly called attention to the “growing scientific understanding that optimal health could not be achieved by health services and individual behaviors alone.” The DEIR also indicated that the Planning Department, in conjunction with the Department of Public Health, was committed to monitoring the progress in community health indicators. The Eastern Neighborhoods Area Plans and rezoning was adopted by the Board of Supervisors, signed by the Mayor and became effective on January 19, 2009.

The Jack London Gateway Project (JLG) was a project planned by the East Bay Asian Local Development Corporation (EBALDC) which, in 2006, proposed to build a 55-unit, low-income housing development for seniors with additional retail space to be completed in the under-utilized parking lot of the existing Jack London Gateway Shopping Plaza located in West Oakland, California.<sup>12</sup> The location for the proposed project was less than 400 feet from Interstate 980 and within 1100 feet of both Interstate 880 and the Port of Oakland. During the assessment phase of the HIA, conducted by Health Impact Partners in conjunction with several local organizations, four specific health determinants were isolated and prioritized with recommendations developed by the HIA participants for potential mitigation of negative health consequences that were sent to EBALDC for consideration. These four health determinants focused on air quality, noise, safety, and retail planning.

For example, the community concern surrounding air quality at the JLG site focused on—given the close proximity to the major highways and the Port of Oakland—the relatively high levels of ambient particulate matter and other vehicle-related pollutants which, without mitigation, could cause individuals living in the senior housing to experience relatively higher rates of chronic and acute respiratory illnesses and higher rates of morbidity due to asthma compared to people living further from these pollution centers.

This was significant since the HIA revealed that no central ventilation system was originally planned for the individual residences in the housing unit. Accordingly, the HIA participants recommended—in addition to measuring and modeling wind and air patterns in order to define the extent of the potential problem objectively and

aid in planning appropriate solutions—the inclusion of mechanical ventilation systems with modest filtration to reduce pollution indoors.

Although EBALDC would not commit to including a ventilation system with air filters for the private residences, it did undertake several steps as a result of the HIA process. These included: changing proposed balconies facing the freeway into bay windows, designing the ventilation system for the common spaces with air filters, modifying the plans to include a main rear entrance through the garden area for increased safety and connection with the existing community, and further engaging the community around security issues. Overall, the importance of the HIA centered on the fact the HIA Working Group was able to engage with EBALDC to discuss issues related to health determinants and health outcomes and for all parties to work together for possible solutions to the negative impacts of the changes to the built environment.

## ALASKA

The Federal Government is currently the largest landowner in Alaska, owning about 62% of total land—over 220 million acres.<sup>13</sup> Consequently, development projects are usually subject to federal environmental regulations, notably the National Environmental Policy Act of 1969 (NEPA). NEPA requires federal agencies to assess the environmental impacts of proposed projects through environmental impact statements (EIS). An EIS generally outlines, among other things, the purpose and need of the project, any possible alternatives to the project, and the environmental effects of the projects. An EIS is required whenever a project is a “major Federal action” that “significantly affect[s] the quality of the human environment.” This requirement extends to projects conducted by state and local governments if a link to the federal government exists, usually through funding. Although NEPA specifically identifies “the quality of the human environment” as a major consideration, courts have interpreted this to mean the “physical environment,” finding that the “human environment” does not include the psychological, sociological, or environmental effects unless there is a primary impact on the physical environment.

In Alaska, many groups were concerned that the federal regulatory framework did not give enough consideration to the health and social concerns of inhabitants who might be affected by resource development projects. To remedy this deficiency, Alaska has looked to HIA to provide a source of regulation and guidance for large scale projects which can affect human health. Although there

is no law in Alaska which requires the completion of an HIA, they are widely considered a “best practices” tool for evaluating new development.<sup>14</sup> In fact, there is an ongoing movement to develop the HIA procedure in Alaska.

The first HIA in Alaska was performed in 2004 in the North Slope Borough and focused on “a more robust health analysis” of recent oil and gas development, notably in the National Petroleum Reserve.<sup>15</sup> The North Slope HIA, which involved collaboration among the North Slope Borough, the Bureau of Land Management, and the Alaska Inter-Tribal Council, was incorporated into the final EIS after intensive examination by the federal government and other agencies. The HIA, completed in 2007, exposed a number of potential health risks from the proposed development, including potentially increased rates of diabetes and obesity due to project impacts on the local diet (which is heavily dependent on fish and game); increased exposure to pollution and carcinogens through emissions and contaminated fish and game; and increased social problems, including substance abuse, domestic violence, and suicide.<sup>16</sup> The HIA also identified a number of potential benefits, including increased employment and increased local revenues which could provide funding for public safety services and infrastructure.

After the HIA identified these potential impacts, the Bureau of Land Management amended the project, adopting a number of additional measures to protect subsistence areas, such as protecting essential hunting and fishing areas and reducing possible interferences with fish and game migration. The HIA garnered further attention from other federal, state, local, and tribal officials, including stakeholders in the proposed Red Dog Mine expansion, who requested a subsequent HIA for the mining project.

The Red Dog Mine is located in Alaska’s Northwest Arctic Borough and is the world’s largest producer of zinc.<sup>17</sup> After the U.S. Environmental Protection Agency, the project’s lead agency, determined the expansion would require the completion of an EIS, the Maniilaq Association, a nonprofit area health provider, joined the EIS as a cooperating agency to perform an HIA for the completed EIS. The Red Dog Mine HIA, completed in 2009, was drafted by the Maniilaq Association with assistance from the Alaska Native Tribal Health Consortium, the Alaska Department of Health and Social Services, and the U.S. Center for Disease Control and Prevention. The HIA identified a variety of potential effects on human health, including exposure to pollution through contamination of local dietary staples and dust



containing heavy metals, and economic and social concerns if the mine were to shut down because expansion was denied. Among other recommendations, the HIA called for monitoring of local game for contaminants, and for the formation of a local health advisory council to analyze on-going health studies to limit detrimental effects of the expansion.

Currently, there are seven HIAs in progress in Alaska: the Alaska Pipeline Project, the Chuitna Coal Project, the Donlin Creek Project Gold Deposit, the Foothills West Road Project, the Point Thomson oil development Project, the Pebble Gold and Copper Prospect, and the Wishbone Hill Coal Project.<sup>18</sup> Each HIA is being conducted under the protocol established by Alaska's Department of Health and Social Services. The HIA Toolkit is the State's unofficial guidance document on HIA, and is maintained by the Department of Health and Social Services. The current format of the HIA Toolkit offers a comprehensive evaluation protocol for "the potential human health effects of new policies, programs, or development projects" through a specialized assessment, depending on the characteristics of the project. This tailored framework allows HIAs to effectively address the specialized needs and concerns of affected stakeholders.

## GEORGIA

In the fall of 2005, the City of Atlanta Council, the Fulton County Board of Commissioners, and the Atlanta Public School System voted to set aside \$1.7 billion in funding to be leveraged to encourage private investment in a new vision for the city.<sup>19</sup> That new vision took the form of a massive public and private investment in parks, trails, transit, and redevelopment known as the BeltLine.<sup>20</sup> The project was intended to set in motion a different trend in redevelopment of the city, one that would "result in quality urban environments linked by transit and green infrastructure."

Because the Atlanta BeltLine project is one of the largest redevelopment projects currently underway in the United States, the City of Atlanta invested in a two-year HIA for the project. The goal of the BeltLine HIA is to make health a part of the decision-making process by predicting possible health consequences of the redevelopment while informing decision makers and the public about health impacts, and providing realistic recommendations to prevent or mitigate negative health outcomes. The project itself was designed to transform a 22-mile loop of Atlanta's freight rail system into parks, trails, transit, and residential and commercial developments and was viewed as a springboard for a new vision for the

City of Atlanta, "one of greenspace, walkability, high-quality infill development, transit, and healthy communities."<sup>21</sup> The BeltLine HIA, which was funded by the Robert Wood Johnson Foundation, was completed by the Center for Quality Growth and Regional Development at Georgia Tech, with technical assistance from the Centers for Disease Control and Prevention. The BeltLine HIA focused on several broad categories of health, including physical activity, access and environmental equity, and safety.

To undertake this task, the HIA team included researchers and practitioners with expertise in public health, city planning, and transportation planning. The HIA itself contained numerous recommendations concerning public policy, implementation, design, maintenance, and operations of the BeltLine.<sup>22</sup> The BeltLine HIA resulted in the identification of several critical overarching issues and five primary areas of potential health impacts related to the BeltLine, including access to health-promoting amenities and goods, opportunities for physical activity, safety, social capital, and environmental issues like air quality, water resources, noise, and brownfields. Moreover, the HIA indicated that there were several issues related to the BeltLine redevelopment that were not limited to specific health impacts, but were more generally related to overall quality of life issues. These included the integration of the BeltLine into existing city structures and systems, mobility priorities, user-friendly designs, and the involvement of all stakeholders in the decision-making process.<sup>23</sup> The BeltLine HIA has also reinforced the link between public decisions and public health consequences and promoted a continuing dialogue between decision makers, city planners, and public health experts on strategies to create a healthy city.<sup>24</sup>

Several long-term recommendations were also made based on the results of the HIA. These included connecting the BeltLine to existing schools in the area through the Safe Routes to Schools (SRTS) program to encourage families and children to be physically active and reduce school-related traffic congestion, establishing a coordinated fare and schedule system that ensures that existing and new services work together as part of an integrated local and regional transit system, and developing a 25-year public involvement process that applies strategies to involve representatives of all stakeholder groups. Due to the extended timeframe of the BeltLine redevelopment project, the HIA team found that it is important that the public involvement process include those people who currently live, work or go to school in the area, as well as the next generation of citizens.<sup>25</sup>

Finally, the HIA also focused on the need to establish policies and programs to prevent displacement in areas surrounding the BeltLine, which included property tax freezes, assistance for housing improvements and other programs that could reduce displacement of residents from neighborhoods where property values are rapidly increasing. The HIA also pointed to the need for innovative solutions to provide access to healthy foods in the redevelopment area, with suggested strategies that included permitting street vendors of fresh fruits and vegetables near transit stations, establishing a weekly farmer's market, developing community gardens, or providing grocers with incentives such as land assembly to create desirable sites for food stores.<sup>26</sup>

## MARYLAND

The TransForm Baltimore HIA was one of the first HIAs to evaluate comprehensive changes to a municipal zoning code revision.<sup>27</sup> Prior to the release of the draft rewrite of the zoning code in June 2010, at both the state and local levels of government in Maryland, there had been an "increasing emphasis on the importance of building sustainable communities." When the decision to rewrite Baltimore City's zoning code was made, the Center for Child & Community Health Research at Johns Hopkins University was enlisted to conduct an analysis of the impact changes to the code would have on the community. The goal of the HIA was to influence the final version of the Baltimore City's new zoning code by contributing information and resources that would be used to revise the rewrite and inform the mapping phase of the process. It was determined that collaboration on an HIA targeted to identify areas of potential health impacts, both negative and positive, could influence policy decisions related to the new zoning code and could also help to promote a healthy Baltimore City.

The aim of the TransForm Baltimore HIA was to research and evaluate how zoning can be used to improve overall health of the citizens in an urban environment and how to optimize the utility of the HIA in informing and influencing policy decisions.<sup>28</sup> The recommendations made in the completed HIA included retaining several elements of the proposed new code that the HIA team demonstrated were "likely to contribute positively to creating healthy communities," including improving access to healthy foods, creating walkable environments and expanding mixed use areas. Further recommendations by the HIA team included revisions that should be made to the proposed new code, including the prevention of off-premise alcohol sales outlets in transit-oriented development and industrial mixed use zones, and the use of CPTED (crime

prevention through environmental design) principles in landscape ordinance and design standards.

The Department of Planning released the draft of the new zoning code in June of 2010. Since then, the Department of Planning has held several major public presentations and discussions around the City to broaden the opportunity for public input. The Department also extended the comment period on the draft code and, due to strong interest and the number of comments, ideas and suggestions to date, has decided to prepare a second version of the draft code prior to presenting legislation to the City Council. This second version is expected to reflect, among other things, the input of the HIA.

## PENNSYLVANIA

In recent years, HIA has been used in Pennsylvania to evaluate the effects, both positive and negative, that the development of a casino can have on a community or region. The Center for Health Equity at Drexel University School of Public Health was asked to conduct an HIA to study the potential health impacts of a slot machine casino under construction in a residential area of Philadelphia, Pennsylvania.<sup>29</sup> The HIA identified a number of major pathways through which the casino might impact health, including employment opportunities, traffic congestion, physical activity, and problem gambling. The HIA also evaluated the need for public health services tied to the creation of a casino in the region. The HIA found that the SugarHouse Casino is likely to have social and economic impacts that are associated with both positive and negative health outcomes for the Philadelphia area. Specifically, the HIA identified potential health impacts that might affect racial/ethnic minorities in the area, and recommended that a more robust HIA be completed to inform the policy process related to casinos in Pennsylvania and highlight the potential disparities in health outcomes among racial/ethnic sub-populations.<sup>30</sup> The Health Impact Project has identified HIA as a valuable tool for evaluating future casino projects in order to provide affected communities and stakeholders with an opportunity to voice concerns and promote health benefits and reduce health costs.

## III. HIA MAKES ITS WAY TO NEW YORK

There is currently no general statutory requirement or framework for the content of HIA in New York. However, HIAs are already being discussed and used in the state. For example, the University of Rochester is conducting an HIA as part of its contribution to the Local Waterfront Revitalization Plan for Rochester.<sup>31</sup> The Health Impact Project,

a collaboration of the Robert Wood Johnson Foundation and the Pew Charitable Trust, awarded the grant to the University to conduct a study to inform a waterfront revitalization plan in low-income neighborhoods focusing on how the plan could affect health-related outcomes and opportunities such as physical activity, air and water pollution, and seafood contamination.<sup>32</sup> The HIA is designed to supplement the development of the city's Local Waterfront Revitalization Program (LWRP) through the use of data collection and analysis that will help inform decisions affecting area waterways and shorelines. Specifically, the HIA is scoped to incorporate health considerations in the revitalization's goals, plans, and recommendations since the LWRP will guide decisions related to land and water uses, development, transportation, and management of natural resources in the waterfront area. Various stakeholders, including the Sector 4 Community Development Corporation, the Monroe County Department of Public Health, and the Rochester Department of Neighborhood and Business Development, have expressed strong support for the HIA and intend to actively participate.<sup>33</sup> The University of Rochester and other stakeholders hope to create a state-wide model for incorporating HIA in the LWRP process.

Another recent study funded by the Robert Wood Johnson Foundation and the Pew Charitable Trust contains a case study focusing on how HIA could be incorporated into land use decision making in New York through the SEQRA process, further opening the discussion of whether HIAs should be independent of, or incorporated into, other environmental impact assessments.<sup>34</sup> Setting the stage for what could be a precedential view on which discipline should oversee the study and production of HIA in New York, a group of physicians lobbied Governor Cuomo and the State Health Commissioner, asserting that the Department of Environmental Conservation should not have authority to review and comment on what are purely medical impacts related to hydrofracking in New York.<sup>35</sup> This lobbying followed on the heels of findings from a Committee of the Medical Society of the State of New York that hydrofracking could have serious health impacts.<sup>36</sup> An HIA is currently underway in New York, under the auspices of the NYS Department of Health, to study the health impacts of hydrofracking.<sup>37</sup> While a panel of outside experts has been appointed to conduct the review, several groups have raised concern that this review will not meet the standard protocol for HIAs as set out by the Center for Disease Control.<sup>38</sup>

The commissioner of the Department of Environmental Conservation (DEC) has indicated the New York State Department of Health (NY DOH) will review the DEC's assessment of the health impacts of hydrofrack-

ing.<sup>39</sup> The NY DOH found in an analysis it prepared early last year that the much-debated drilling technology known as hydrofracking could be conducted safely in New York. That eight-page analysis is a summary of previous research by the state and others, and concludes that hydrofracking can be done safely and delves into the potential impact of fracking on water resources, on naturally occurring radiological material found in the ground, on air emissions and on "potential socioeconomic and quality-of-life impacts."

Several stakeholder groups, however, are concerned with the report because it falls short of a comprehensive HIA. The report is not a traditional HIA as defined by the World Health Organization and the CDC. It "remains difficult to discern how much original research the state has done on potential health impacts, and environmentalists worry that the administration's lack of transparency is hiding a lack of rigor in its assessment of public health risks."<sup>40</sup>

## NEW YORK STATE PROPOSED LEGISLATION CALLING FOR HIA

During the 2012 Legislative Session in New York, several bills called for the incorporation of HIA in the study of hydrofracking regulation. For example, S.B. 2697 would have amended Article 23 of the ECL to add a new title 31 entitled "HEALTH IMPACT ASSESSMENT."<sup>41</sup> The bill would have prohibited permits for gas drilling until "the Department of Health has completed the health impact assessment...and the Department has adopted regulations and implemented any mitigation measures recommended in the health impact assessment."<sup>42</sup> The bill made clear that the purpose of a HIA would be to provide "detailed information about the effect oil and gas operations are likely to have on public health, to identify measures that could be implemented to minimize any adverse effects of such operations, and to suggest alternatives to such an action so as to form the basis for a decision whether or not to undertake or approve such activities."

S.B. 2697 further required that the Department of Health prepare, or cause to be prepared, a comprehensive HIA of oil and gas operations involving any shale formation, including all operations related and incident thereto, which may have an adverse impact on public health.<sup>43</sup> In addition, the legislation would also require that, where the Department of Health concluded (or the HIA indicated) that the oil and gas operations occur in, or would disproportionately impose negative health impacts upon, a potential environmental justice area, the Department would require a site-specific HIA as well.



Under the legislation, no permit would be issued in any area subject to a site-specific HIA until the site-specific HIA had been completed and the mitigation measures suggested therein had been adopted.

Other legislative proposals, S. 6772 and A. 10234, would have required a school of public health within the State University system to “conduct a comprehensive health impacts assessment, following a model recommended by the United States Centers For Disease Control and Prevention and the National Academy of Sciences, to examine potential public health impacts that could be caused by horizontal gas drilling and high-volume hydraulic fracturing and related activities conducted in connection with such drilling.”<sup>44</sup> The bill directed that the assessment include, at a minimum, the following:

- (a) Identification and assessment of potential localized and statewide health impacts from horizontal gas drilling and high-volume hydraulic fracturing, extraction, and related activities in the state;
- (b) Identification and assessment of potential health impacts determining the magnitude, nature, extent and likelihood of potential health impacts utilizing multiple methods and information derived from a combination of public health tools including risk assessment, literature, population analysis, and expert opinions from multiple sources;
- (c) Identification and assessment of potential health impacts as they relate to environmental justice concerns;
- (d) Estimated costs of any health impacts from horizontal drilling and related activities to the state, local governments, health insurers, employers and the state’s public and private health care systems as a whole;
- (e) Recommendations for any mitigation of potential health impacts and the methods and evidence used to arrive at such recommendations, which may include potential recommendations against any or all drilling activities; and
- (f) A long-term plan for monitoring, evaluation, follow-up, and mitigation of potential health impacts throughout the period that horizontal drilling would take place in the state if such activity is to be recommended.

The New York State Assembly recently passed legislation that would suspend the issuance of certain types of natural gas drilling permits in the State of New York until May 15th of 2015. The bill, Assembly 5424-A, which Assembly Member Silver cosponsored with the Chairman of the Committee on Environmental Conservation, Assembly Member Sweeney, established the moratorium

in order to give the Legislature sufficient time to more fully review the available data and to assess the findings of the Department of Environmental Conservation (DEC) once they are released. The moratorium would not apply to the permitting of the drilling of conventional vertical natural gas wells outside of the Marcellus and Utica formations, but would require that a school of public health within the State University of New York conduct, and make public by April 15, 2014, “a comprehensive health impact assessment—following a model recommended by the Centers for Disease Control—to identify the risks associated with horizontal drilling and high-volume hydraulic fracturing, and to develop a long-term plan for monitoring, evaluating, tracking and mitigating potential public health impacts.”<sup>45</sup> It would appear that the call for the use of a comprehensive HIA that follows the protocol set forth by the Center for Disease Control is gaining momentum in New York.

#### IV. CONCLUSION

Many HIAs today are currently conducted outside any legislative or regulatory frameworks or legal requirements.<sup>46</sup> Most HIAs are voluntarily undertaken and any recommendations resulting from an HIA are being adopted, when they are being adopted, under the concept of best practice standards. However, where HIA is required by policy or regulation, different jurisdictions have taken different approaches to developing the legal framework to support the use of HIA.<sup>47</sup> Today, in the U.S., an HIA is normally initiated and led by health officials, but can also be initiated by community-based organizations, officials in agencies directly responsible for the proposed policy or project, or private developers. Ultimately, the team conducting an HIA should typically include professionals with public health expertise as well as experts in other fields, such as urban planning, land use and zoning. Issues related to the funding and legislation that might be necessary for HIA use in New York will need to be addressed before HIA can be widely adopted, but land use and environmental lawyers and planners in New York should be familiar with HIAs and the impacts that such assessments might have as an official part of, or an unofficial complement to, the EIA process in New York. Further, given the growing interest in the use of HIA for controversial activities on land by the State Legislature, land use practitioners should be mindful of potential legal requirements that might develop through the legislative process.

## NOTES

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40. "The document itself is not a health impact study at all," said Katherine Nadeau, the water and natural resources program director at Environmental Advocates of New York, who has reviewed it. "As drafted it is merely a defense or justification as to why the administration didn't do a rigorous study." Danny Hakim, Gas Drilling Is Called Safe in New York, New York Times, January 3, 2013, available at [https://www.nytimes.com/2013/01/03/nyregion/hydrofracking-safe-says-ny-health-dept-analysis.html?\\_r=0](https://www.nytimes.com/2013/01/03/nyregion/hydrofracking-safe-says-ny-health-dept-analysis.html?_r=0).
41. Under the bill, Section 23-3101, "Preparation of health impact assessment," would have been added to the ECL.
42. New York Senate Bill 2697.
43. Under S.B. 2697, the HIA would be required to include a detailed statement setting forth the following: (i) a description of the operations; (ii) the public health impact of the

operations, including short-term and long-term effects; (iii) whether an operation occurs in, or disproportionately will impose negative health impacts upon, a potential environmental justice area, and if so, the identity of such area; (iv) any adverse public health effects that cannot be avoided; (v) alternatives to the oil and gas operations generally or alternatives to any aspect related or incident thereto which may have an adverse impact on public health; (vi) mitigation measures proposed to minimize the public health impact; and (vii) any such other information consistent with the purposes of Article 23 of the ECL as may be prescribed in guidelines issued by the commissioner.

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## RECENT CASES

### APPELLATE DIVISION, THIRD DEPARTMENT, UPHOLDS RIGHT OF MUNICIPALITIES TO BAN "FRACKING."

In August 2011, the zoning ordinance of the Town of Dryden was amended to ban all activities related to the exploration for, and production or storage of, natural gas and petroleum. The ban encompassed hydraulic fracturing, also known as "hydrofracking" or "fracking," a controversial method of recovering natural gas from underground shale deposits.

Anschutz Exploration Corporation, a driller and developer of oil and natural gas wells that owned leases covering land in the Town, brought a combined proceeding pursuant to CPLR Article 78 and action for declaratory judgment seeking invalidation of the zoning amendment on the ground that it was preempted by the Oil, Gas and Solution Mining Law. Supreme Court granted summary judgment to the Town, concluding that, with the exception of a provision invalidating permits issued by other local or state agencies, the amendment to the zoning ordinance was not preempted by the OGSML.

On appeal, the Appellate Division, Third Department, affirmed. The court noted that the supersession clause in the OGSML provides that "[t]he provisions of [Environment Conservation Law article 23] shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads

or the rights of local governments under the [RPTL].” Thus, the plain language of that provision prohibits municipalities from enacting laws or ordinances “*relating to the regulation of the oil, gas and solution mining industries*” [emphasis added by the court].

“Regulation,” continued the court, is commonly defined as “an authoritative rule dealing with details or procedure.” The Town’s zoning ordinance, however, did not seek to regulate the details or procedure of the oil, gas, and solution mining industries. Rather, it simply established permissible and prohibited uses of land within the Town for the purpose of regulating land generally. While the Town’s exercise of its right to regulate land use would inevitably have an incidental effect upon the oil, gas, and solution mining industries, the court concluded that zoning ordinances are not the type of regulatory provision that the Legislature intended to be preempted by the OGSML. The court undertook an extensive review of the legislative history and the purpose and policy of the OGSML, and the interpretation accorded to the similar supersession provision in the Mined Land Reclamation Law, and held that both these inquiries supported this conclusion. Nor could it be said that the Town’s ordinance was impliedly preempted by the OGSML, inasmuch as the ordinance did not conflict with the language or the policy of the OGSML. *Norse Energy Corp. USA v. Town of Dryden*, 2013 WL 1830800 (N.Y. App. Div. 3d Dep’t 2013).

### APPELLATE DIVISION, SECOND DEPARTMENT, HOLDS THAT 40 OR MORE RACING PIGEONS IS NOT “A REASONABLE NUMBER OF CUSTOMARY HOUSEHOLD PETS.”

David La Russo applied for an interpretation of the Village of Mamaroneck Code stating that a racing pigeon constituted a “customary household pet.” After a hearing, the Zoning Board of Appeals of the Village denied the application, ruling in effect that for La Russo to keep a coop of 40 or more racing pigeons on his residential property was not a permissible accessory use. La Russo sought relief in Supreme Court by an Article 78 proceeding, but his petition was denied and the proceeding was dismissed.

On appeal, the Appellate Division, Second Department, affirmed. The ZBA had determined that La Russo’s proposed use of a coop in his backyard to keep and raise 40 or more racing pigeons did not qualify as keeping “a reasonable number of customary household pets”

within the meaning of the Village’s Code. In reaching this determination, the ZBA considered evidence that these pigeons would be specially bred, trained, and handled to compete in races, at least some of which might result in cash prizes. There was evidence that only La Russo and his father would handle the vast majority of the pigeons, the “race birds.” Other members of the household, including the La Russo’s children, would not be able to handle the “race birds” because those birds were too sensitive and valuable. Moreover, there was evidence that pigeons that were too old, slow, or weak to race would be sold or destroyed. Additionally, nothing in the record revealed that any other residents of the Village kept 40 or more pigeons on their residential lots, for any purpose. It was neither unreasonable nor irrational for the ZBA to conclude that 40 or more racing pigeons, as contemplated by La Russo, did not constitute a “reasonable number of customary household pets.” *La Russo v. Neuringer*, 105 A.D.3d 743, 962 N.Y.S.2d 633 (2d Dep’t 2013).

### APPELLATE DEPARTMENT, SECOND DIVISION, HOLDS THAT LETTER INFORMING APPLICANT THAT BOARD HAD APPROVED APPLICANT’S SITE PLAN DID NOT CONSTITUTE DECISION FOR PURPOSES OF 30-DAY STATUTE OF LIMITATIONS FOR CHALLENGING THE DECISION.

Louis and Laura Maddaloni owned a parcel of residential property abutting Stony Brook Harbor and located in the Village of Head of the Harbor. In 2007, the Maddalonis submitted a site plan application to the Village for the demolition of the existing residence on the property and the construction of a new single-family residence with a pool and pool house. Although an advisory body created by the Village and the Village of Nissequogue found that the site plan was inconsistent with the Local Waterfront Revitalization Program adopted by the two villages, this ruling was overruled by the Village’s Board of Trustees. The Village’s Planning Board held a public hearing on the site plan application and approved the site plan in January 2011.

Other landowners in the vicinity brought a hybrid proceeding to, inter alia, review the site plan approval. The Village, the Planning Board, the Village Zoning Board of Appeals, and the Maddalonis moved to dismiss the petition/complaint. The Supreme Court granted the motion in part and dismissed three of the landowners’ causes of action. The court held that the second cause of action,



which sought review of the Planning Board's determination to grant site plan approval, was untimely because it had not been brought within 30 days of the decision.

On appeal, the Appellate Department, Second Division, reversed that part of the Supreme Court's ruling. The letter from the Chairman of the Planning Board, informing Louis Maddaloni that the Planning Board had approved the site plan, did not constitute a decision for the purposes of the 30-day statute of limitations contained in Village Law § 7-725-a(11). The letter, which did not indicate the vote of the Planning Board's members, was merely notice that a decision had been made.

The only document in the record that could constitute the Planning Board's decision was the minutes of the Board's meeting on January 11, 2011, which contained the text of the resolution approving the site plan application and indicated that the resolution was unanimously adopted by the Board members present. Since there was no indication as to when, or even if, the minutes were filed with the Village Clerk, the 30-day limitations period did not begin to run before this matter was commenced in March of 2011. Accordingly, the second cause of action was not time-barred by Village Law § 7-725-a(11). *In re Shepherd*, 103 A.D.3d 901, 960 N.Y.S.2d 171 (2d Dep't 2013).