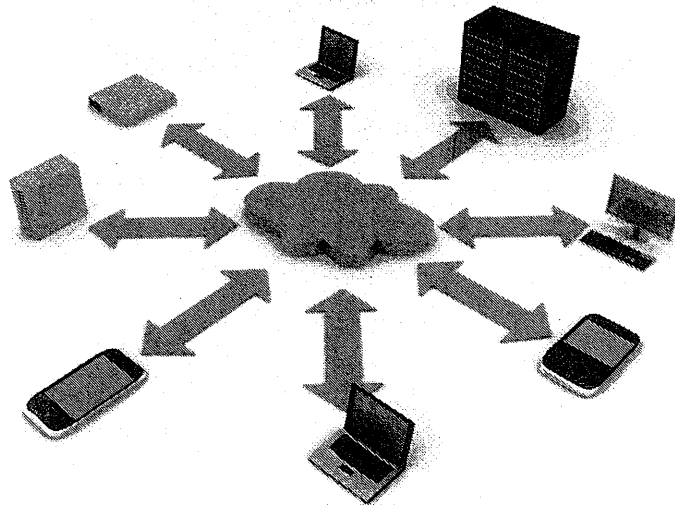


Electronic Participation In Land Use Board Meetings

By: Jonathan E. Drill, Esq. NJPO Associate Counsel

NJPO Calendar of Events*

June 4, 2014	Webinar with NJSLOM A review of the New COAH regulations
Sept. 21, 2014	Mandatory Training 9:15 to 2:15 Paramus Life Safety Building
Oct. 18, 2014	Mandatory Training 8:15 to 1:15 Brookdale Community College
Oct. 25, 2014	Mandatory Training 8:15 to 1:15 Hillsborough Municipal Complex
Nov. 18-20, 2014	New Jersey State League of Municipalities Conference, Atlantic City



Second, there is what COAH is calling the “fair share need”, or “prospective need, which is the estimated number of units that will be needed from 2014 to 2024. Here, COAH estimates the need at 30,633.

Lastly, there is what COAH is calling the prior round unmet need, which COAH estimates at 21,588.

The regulations account for a buildable limit, which is referenced in Appendix E of the proposed regulations. The primary means of compliance is “inclusionary

I read with interest the article by Richard Preiss published in the May / June 2013 issue of The New Jersey Planner (Vol. 74, No. 3) regarding the pitfalls of using email and social media by officials engaged in land use planning. This article starts where Mr. Preiss’ article ended, addressing the issue of whether board members may participate in a hearing via telephone or through video communications equipment. Exploration of this issue is quite timely as, during the course of the snow storms in February, I received a number of inquiries from members of the various land use boards I represent as to the legality of electronic participation in land use board meetings. One of Mr. Preiss’ conclusions was: “Quite clearly, if the board lacks a quorum, it should not be made up by having a board member participate electronically.” I disagree with this conclusion and will explore the issues involved in this article.

The Municipal Land Use Law (the “MLUL”) provides in N.J.S.A. 40:55D-9:

No action shall be taken at any meeting without a quorum being present. All actions shall be taken by a majority vote of the members of the municipal agency present at the meeting

In This Edition:

COAH Update
 Electronic Participation in Land Use Board Meetings
 Wind Turbines and New Jersey Land Use Law :
 Not So Perfect Together Yet
 Recent Case Law
 Planner in Memoriam

The Open Public Meetings Act (the “OPMA”) defines “meeting” N.J.S.A. 10:4-8(b) as including:

Any gathering whether corporeal or by means of communication equipment, which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body present, to discuss or act as a unit upon specific public business of that body.

To summarize, the MLUL prohibits any action to be taken by a board unless a quorum is “present” at a “meeting” of the board and also requires that all actions be taken by a majority vote of the members “present at the meeting,” and the OPMA defines a “meeting” to expressly include a gathering of board members where one or more of the members are “present” through “communication equipment.” Thus, it is clear under New Jersey law that not only may a board member participate in a meeting of the board by telephone or other electronic means but that the board may obtain a quorum through its members participating in a meeting through communication equipment.

What is unclear is whether any specific communication equipment is required in order for a board member to participate in such a meeting and/or whether any specific communication equipment is required in order for a board member to participate in a hearing on an application for development.

The leading land use treatise in New Jersey states that two-way telephonic communication equipment is sufficient for a board member to participate in “routine matters such as a board’s reorganization or a determination of meeting schedules,” but that participation in a hearing for an application for development “would require more sophisticated equipment,” which would have to include audio and video components, “since visual contact with witnesses and exhibits is necessary”, Cox and Koenig, New Jersey Zoning and Land Use Administration (Gann 2014), section 2-7.3. I agree with this view and believe that a board member may participate without being physically present in a reorganization meeting, or the portion of a regular or

special meeting devoted to matters other than hearings on applications, through the use of two-way communication equipment, such as telephone or computer. In such a case, however, the communication equipment in the meeting room must have a “speaker phone” or be otherwise audible to all board members and members of the public physically present.

In order for a member to participate in a hearing on an application for development without being physically present, however, I believe that more sophisticated equipment must be used. Specifically, I believe that for a member to be deemed “present” in order to participate in a hearing on an application for development the communication equipment must have combined audio and video capabilities. Further, the audio must consist of a “speaker phone” or be otherwise audible to all board members, the applicant and members of the public physically present at the hearing and, as importantly, the video must allow the member to see all exhibits and everyone that speaks, testifies or asks questions during the hearing. Thus, a fixed view camera would not be sufficient. If the video equipment does not allow the member to see the exhibits being considered and all people who speak, as well as hear everything that happens at the hearing, I do not believe that the member can be deemed “present” at the hearing within the meaning of the MLUL and the OPMA for purposes of participating. Thus, multiple cameras or a videographer would have to be used so that the member could not only hear everything said during the hearing but see everything during the hearing as well.

The final issue that must be discussed is the requirement that meetings held electronically must remain open to the public. As indicated above, I believe it is clear under New Jersey law that a board may obtain a quorum through its members participating in a meeting through communication equipment. In fact, two of the boards I represent held meetings this past February in which a majority of members participated by telephone due to snow conditions. (There were no hearings on applications

scheduled.) I advised both boards to utilize conference call-in lines and to provide notice of the call-in number to the public and at least two newspapers so that the public could participate in or be present in the meetings by telephone if they wished. Additionally, I advised both boards that there had to be a physical presence by at least the board secretary at the noticed site of the meeting and that the board secretary had to use a speaker phone in the meeting room so that any members of the public who wished to participate in or be present for the meeting would also have the opportunity to do so. ¶

Wind Turbines and New Jersey Land Use Law –Not So Perfect Together Yet

By: Stuart Lieberman, Esq.



Land use ordinances and case law are a lot like science in that they tend to follow societal developments and adapt to new realities. Take, for example, drive-through windows associated with restaurants, stores, and banks. It took years for municipal land use boards to reconcile their ordinances, which often prohibited these windows outright or made them conditionally permitted, with the emerging reality that every bank and fast food restaurant not only wants them but considers them a necessity to becoming a competitive business in their field.

Cell towers presented a similar issue. The Federal Communication Commission practically, but definitely not completely, regulates these towers. However, local boards initially had trouble understanding the interplay between the Federal Telecommunications Act and evaluating the land use suitability of a proposed tower. Now many enlightened municipalities have telecommunications facility ordinances which go a long way in resolving the many problems that the applicants, boards, and citizens groups had in evaluating where, from a land use perspective, these towers fit best.

Now comes the wind turbine. There are very few reported lawsuits on wind turbines in New Jersey because there still are not that many turbines in the State. However, the numbers are growing, and, no doubt, the approval processes will not likely resemble a 1960s love-fest.

In New Jersey, several iterations of a model wind turbine ordinance have been advanced with the assistance of the federal Department of Energy, and the State's Department of Environmental Protection and Board of Public Utilities. Turbines present issues common to the iterations of issues reminiscent of the cell tower debates: setback requirements, equipment access, appearance, color and finish, board application requirements for submission, and enforcement. Some drafts limited public participation and some required approval or rejection within short periods following submission of the application.

The Borough of Ocean Gate, New Jersey, was one of the first municipalities to adopt a model wind turbine ordinance and then installed a turbine. Government stimulus money adding up to over \$400,000.00 was reportedly used to build the turbine, with the purpose being that the municipality wanted to reduce its own electric costs.

However, it is well known based on published reports and conversations this author has had with many affected people that satisfaction with the tower is far from uniform. According to public complaints, people who live near the tower have been very upset because

of the turbine's noise and because of a strobing light effect that emanates from between the spinning turbine blades.

New Jersey has three statutes that address wind turbines and land use. A 2009 law makes turbines a permitted use in industrially zoned parcels that are 20 acres or more. Another statute allows turbines as of right on certain piers. Lastly, a 2010 law provides guidelines for local ordinances regulating small wind energy systems, defining provisions that would be "unreasonable" and therefore not allowed. Numerous New Jersey municipalities have now adopted their own turbine ordinances.

There have been many studies on wind turbines over the past five years. They are by no means consistent in terms of what they report and they are readily available for review. There is no question that turbines produce clean energy that is renewable and that there are regulatory and financial incentives in place to construct them.

However, as is generally the case with land use and real estate, location is very important. These turbines should not be in residential neighborhoods. There are enough studies available to make it clear that in off shore and industrial zones, they can make a lot of sense, but they should not be mixed within residential communities.

First, residents often suffer from a constant gear churning sound that is loud, sometimes 60 decibels, which would violate many local noise ordinances. The noise seems to bother people who are unfortunate enough to live near these turbines, which by the way, can be as tall as a football field (no, they are not little cute wooden windmills). And once they are built, the damage is done. Due to the extreme expense of installing one of these turbines, there are few legitimate options other than relocating the affected residents.

Second, there are numerous reports that these turbines can catch fire. The fire risks including blade failure, gearbox failure, and lightning strike, among others.

A quick search of the internet would result in videos of burning wind turbines. This may be an acceptable risk off shore or in an industrial area. However, this risk is not acceptable in a residential area.

Third is the light strobing problem claimed in Ocean Gate and in many other communities in the United States and around the World. The lights shine through the turbines as they rotate, producing a constant "disco-light" appearance that would make Donna Summer proud, but are not so great when people are just trying to peacefully enjoy their lives.

They can also interfere with wildlife, require cutting lots of trees, may not always efficiently produce electricity, and can even interfere with television reception and other appliances.

Ultimately our land use boards will have to work through these issues in much the same way they successfully figured out how to deal with cell towers. We all experienced some measure of frustration with the initial wave of cell tower applications. Now many municipalities have ordinances that go a long way in defining suitable locations that harmonize the needs of local residents, businesses, and the few remaining cellular providers.

Wind turbines will go through this same kind of learning process. Clearly, we are at the very beginning of this process and details will have to be worked out as we proceed along. We can be confident that turbines will no longer be constructed in residential areas, that they will be constructed in suitable industrial zones and off shore, and they will continue to emerge as one of many means of becoming an energy self-reliant State and Nation. ♣