



Boylan Code

Shale Gas Drilling in New York State

**The Town Shale Gas Toolbox: The Tools and Risks
Involved in Addressing Shale Gas Locally, Including
Takings Claims**

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Legal Landscape of Hydrofracking in NY -

- 1992 - Final GEIS regarding Oil and Gas Mining issued by DEC
- 2008 - Initial NY Moratorium on Hydrofracking and Begin SEQR
- Sept. 30, 2009 - DEC releases initial *draft* SGEIS - public comments
- November 2010: Executive Order prohibiting issuance of permits for **horizontal** hydraulic fracturing
 - 1992 GEIS did not sufficiently address the horizontal hydraulic fracturing method
- Sept. 2011 - DEC releases *revised* draft SGEIS and proposed hydraulic fracturing Regulations
- Nov. 2011 - Revised Regulations released, extension to SEQR public comment period
- January 11, 2013 - Extended SEQR Public Comment Period for SEGIS ends
 - DEC reviewing the over 70,000 comments received as part of the SEQR review.
- February 2013 - Final Regulations must be published by Feb. 13/27 (failed to meet deadline)
 - “DEC will not take any final action or make any decision regarding hydraulic fracturing until after Dr. Shah's *health review* is completed and DEC, through the environmental impact statement, is satisfied that this activity can be done safely in New York State.”
- Currently - NY SEQR Review Incomplete; Will likely need to re-start public comment period on proposed Regulations; horizontal hydraulic fracturing is still prohibited in NY State.



Highlights of Proposed DEC Regulations on Horizontal Hydraulic Fracturing

- Protection of NY drinking water by prohibiting drilling:
 - Within 2,000 feet of all public drinking water supplies,
 - Within 500 feet of private wells,
 - Within floodplains,
 - Within 4,000 feet of the Syracuse watershed, and
 - Within 4,000 feet of the NYC watershed
- Local Government Involvement
 - DEC will notify the local municipality when a permit is applied for
 - Permit should comply with the local municipality's land use regulations
 - Otherwise, additional level of review by DEC
- Identification of Chemicals
 - Full disclosure of all chemicals
 - Evaluation of alternative chemicals
- Waste Water
 - DEC approval of disposal of waste water
 - DEC will monitor disposal of waste water



What Tools do Local Municipalities Have?

Bans, Moratoria and Other Local Land Use Regulations

The Preemption Dilemma – ECL 23-0302:

“The provisions of [Mineral Resources Article 23 of the ECL] shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries . . .”

- Does the ECL prohibit Towns from banning/regulating hydrofracking?
- For some time, much debate and speculation . . .

- **Town of Dryden Case** – Filed in 2011 by energy company with millions invested in gas leases in Town of Dryden
- **Town of Middlefield Case** – Filed in 2011 by land owners who leased their land to energy companies and sought to collect natural gas royalties
- Both Towns, through their Zoning Local Laws, had banned natural gas drilling activity within their borders.
- The Plaintiffs challenged the bans, arguing ECL prohibits (or *preempts*) the bans.
- Both Courts, in Feb. of 2012, decided in favor of the Towns, holding that the ECL does not prohibit such bans.
- Courts held that ECL **prohibits municipalities from regulating the “how” of drilling, but not the “where”**
 - “**How**” = Manner and Method (e.g., hours , types of machinery, types of chemicals) – State Regulation Only.
 - “**Where**” = Geographic Location (e.g., zoning districts, complete ban). – Local Regulation Permitted
- Both cases have been appealed – decisions subject to be overturned.
 - Bans, Moratoria and Land Use Regulations are Permitted, for now.
 - Final word will be had by the Legislature or higher NY State Court.
- **City of Binghamton Case (Jeffrey v. Ryan)** – Decided October 2012 - Echoed Findings of Dryden and Middlefield with respect to Preemption Analysis, but reversed ban/moratorium on other grounds



Road Regulations

- **No Fracking without Heavy Duty Trucks**

- Movement of Heavy Duty Machinery to Construct Drill Site
- Movement of Water
- Movement of heavy Duty Equipment to Operate Drill Site



- **NY Vehicle and Traffic Law:**

- Establishment of Heavy Haul Routes
 - Prohibit vehicles that exceed 10,000 pounds from traveling on certain roads
- Temporarily Closure of Roads
 - Vehicles exceeding 8000 pounds
- Permit Requirements
 - Bonding



Road Use Agreements

- **Road Use Agreement** – *Voluntary* Agreement between a Town and Energy Company regarding Local Roads
- No Legal Requirement to Enter into Agreement, but once entered into, Legally Binding.
- Why would an Energy Company Agree to such a Thing?
 - Relationships Key to Avoiding Opposition.
- Primary Benefits of RUAs: Energy Companies are held responsible for road maintenance.



- Agreements Typically Include:
 - Documentation of pre-activity road conditions (Engineering, Documentation)
 - Establishment of haul routes
 - Posting of Security Bonds
 - Affirmation by Energy Company that roads remain safe and open
 - Energy Company agreement to pay for or otherwise monitor roads
 - Energy Company Agreement to repair roads if damaged



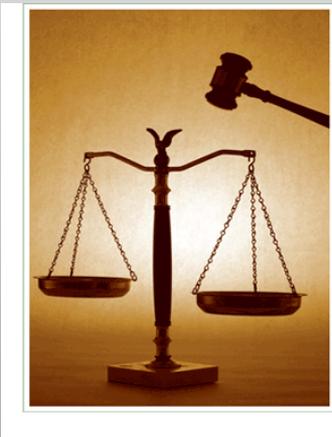
Host Community Agreements

- **Host Community Agreement** – Similar to RUAs, HCAs are Contractual Agreements between a Town and an Energy Company
 - May include an RUA as a portion of the HCA
- Generally, no Legal Requirement to Enter into HCA, but once entered into, Legally Binding
- Why would an Energy Company Agree to an HCA?
 - Same as RUA - Relationships Key to Avoiding Opposition, including future costly litigation, etc.
- Primary Benefits of HCAs: Town is able to more broadly address and mitigate Town-wide concerns related to Hydrofracking (beyond Roads)



- **HCAs May Include:**

- RUAs and all the benefits contained therein
- Payment Requirement, usually tied to impact on the Town (perhaps based upon gas output)
- Complaint Resolution Process (where to send Complaint, inspection, how long to respond, etc.)
- Noise Compliance Testing
- Lighting Compliance Testing
- Post-Drilling/Extraction Monitoring



Laws of General Applicability

- A Hydrofracking endeavor is a big deal. As a result, a fracking operation may be reached by a variety of different laws. It is likely that general laws (perhaps already on the book) may be effective in addressing hydrofracking.



- Regulations incidental to hydraulic fracturing:
 - Signs,
 - Noise,
 - Lighting,
 - Manufactured Homes, and
 - Waste Water Treatment.

Summary of Options Available to Local Municipalities



- Moratoria(subject to appeal),
- Ban (subject to appeal),
- Comprehensive Zoning Regulations, such as allowing in Industrial Districts but Prohibiting in Residential Districts (subject to appeal),
- Road Regulations, including
 - Heavy Haul Routes,
 - Closure of Roads,
 - Permits for Heavy Vehicles,
- Road Use Agreements,
- Host Community Agreements, and
- Laws of General Applicability (Noise, Lighting, etc.).
- Important Note – Generally, all must be consistent with a Comprehensive Plan.



What are the Risks to Local Municipalities?

1. Change in NY State Law - NY State Legislature amends and clarifies ECL Section 23-0302 to specify that *the ECL in fact preempts local zoning regulations* dealing with hydrofracking.



1 and 2 Result → Local Legislation is now contrary to law –requiring repeal. Ct challenge for damages for delay/impairment to energy companies?

2. Appeals - Appellate Court overturns Dryden/Middlefield and/or other related decision, holding that *ECL Section 23-0302 in fact preempts local zoning regulations* dealing with hydrofracking.

3. Takings Claims – Lawsuit against local municipality claiming that local regulations constitute an illegal, unconstitutional taking of property.



What is a Takings Claim?

Violation of the 5th Amendment of the United States of America



“ . . . nor shall *private property* be **taken** for *public use*, without *just compensation*.”

Illegal Taking = Government → Taking → of Private Property → without Just Compensation



Legal Taking = Government → Taking → of Private Property → **with** Just Compensation (AKA Eminent Domain / Condemnation)

Supreme Court of United States:

The 5th Amendment bars governments from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”

The Different Flavors of Takings

Several varieties of takings:

Physical:

Government permanently and physically occupies private real property for public use; Often actual, full fee title to private real property is acquired by the government thus affecting a change in title to the real property at issue.



Exaction:

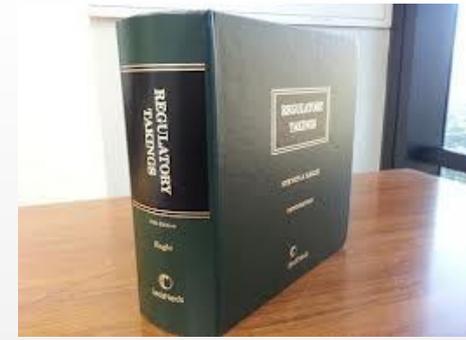
Illegal taking arising out of governmental fee or other required compensation to government (such as a permit fee);

Requirements to avoid Exaction Taking:

- Sufficiently close relationship between the potential harm manifested via the fee and the beneficial effects of the fee;
- Cost of fee and benefits of its use must be balanced;

Regulatory Takings

A takings claim wherein government regulations prohibit or otherwise impede upon a private land owner's use of his land.



E.g. → Government Zones out Hydrofracking within its jurisdiction → This prohibits private landowners within its jurisdiction from full use of land by preventing them from engaging in hydrofracking.

Although not a an actual, physical occupation of land, the government still “takes” from a private landowner his right to use his land as he may see fit.



Several Subcategories of Regulatory Takings to be explored.

First →

1. *How does the US Supreme Court analyze Regulatory Takings (and thus how must State Courts analyze takings)?*

2. *How do NY Courts tend to make it more difficult to recover for an unconstitutional taking as compared to other jurisdictions?*



The “Bundle of Rights” Concept



One parcel of real property comprises of a number of distinct real property rights (these rights are the “sticks” in the bundle);

e.g. Subsurface Mineral Rights, Right to Develop Commercially, Right to Keep Public Out/Privacy, Etc.

Taken together, each and all of the real property rights for a single parcel (the “sticks”) comprise the entirety of the real property interest in the parcel (the “**bundle**” or the whole)



US Supreme Court on Regulatory Takings

Two Types of Analyses:

1. The Categorical Taking: Total Deprivation of All Economically Beneficial Use of the Property – The Entire Bundle is Taken



Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992):

- *Land owner purchased two undeveloped beachfront lots in residential area;
- *Intent at time of purchase was to construct two single family beach homes;
- *Shortly after purchase local regulations enacted which precluded development;
- *Land owner sues → Regulatory Taking
- *Court → Regulation deprived Lucas' property of all economically beneficial use
- *Property is essentially worthless without the ability to develop beachfront homes
- *Since a "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation" this constitutes an illegal taking

- The "bundle of rights" was narrowly comprised of essentially only one stick, the right to develop the beach houses, since that right was the only property right of value for the beachfront parcels;

- Any other possible "sticks" in the bundle of such nominal value they were essentially valueless (no other sticks), thus creating a Total Taking – the entire Bundle was taken.

US Supreme Court on Regulatory Takings

Two Types of Analyses:

2. The “Gone Too Far”

Taking: A Regulatory Taking of less than the “Whole” Parcel – “The Golden Stick(s)”



Penn. Central Transp. Co., 438 U.S. 104 (1978)

A taking may arise where a government regulation results in a taking of anything less than total deprivation of all economically beneficial use.

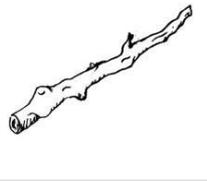
Three Pronged Analysis:

1. Economic Impact of the Regulation
“Dollars and Cents” in NY
2. Interference with Reasonable Investment-Backed Expectations
Need actual Interference
Is the regulated activity highly regulated?
Was the owner aware of the problem that lead to the regulation?
Could the regulation have been anticipated reasonably?
3. Character of Government Action
Physical Takings vs. Regulatory Taking

NY Regulatory Takings – Twigs and Bundles

Although acknowledging the “Penn State” “Gone too Far” concept, NY Courts have largely hesitated to find Partial Takings (Sticks);

Instead, NY Courts generally find takings only under “Lucas” “Total Deprivation” (the Whole Bundle) Analysis



Arguably, Hydrofracking is a “Stick”, because it deals only with a subset of rights for a parcel (subsurface)

Therefore, if NY continues to favor the Lucas “Whole Bundle” analysis, energy companies may find it difficult to succeed with a Hydrofracking Regulatory Takings Claim.

Uphill Argument 1 – Ban on Hydrofracking is a Total Taking because the parcel is only suitable for hydrofracking (hydrofracking is the entire bundle).

A: Unlike vacant beachfront property in a residential area (Lucas), land amenable to hydrofracking in rural NY is often amenable to other uses, such as residential development, recreational uses, etc.

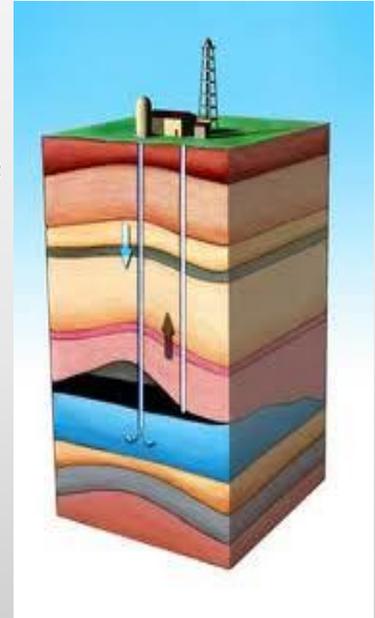
NY Regulatory Takings – Twigs and Bundles

Uphill Argument 2 – One parcel may have many severable “bundles” of rights. Subsurface rights are their own “distinct” bundle. Thus, Lucas would find a “total deprivation” for a hydrofracking ban.

***Smith v. Town of Mendon*, 4 N.Y.3d 1 (2004)**

“We note that the Supreme Court has been reluctant to engage in spatial ‘conceptual severance’ in determining whether a regulation or government action deprives a property owner of all economically viable uses of the property.”

“Hence, we look to the effect of the government action on the value of the property *as a whole*, rather than to its effect on discrete segments of the property.”



Note → On rare occasion, *outside the context of takings lawsuits*, NY Courts *have* recognized a distinct fee simple interest in Subsurface Rights of a Parcel as Distinct from Fee Simple Rights in Surface Rights in the same Parcel (where separate owners for each).

Regulatory Takings

So far we've covered:

- *Types of Takings (Physical, Exaction, Regulatory)
- *How Property Rights are Analyzed Generally (Bundle/Sticks)
- *How Regulatory Takings are Analyzed by the SC (Entire Taking [Lucas] or "Too Far" [Penn])
- *How NY Courts Analyze Takings (Favor Lucas / Bundle / Whole)

Three Main Subtypes Relevant to Hydrofracking:

1. Permanent governmental restriction on land use which is anticipated, but not yet engaged in;
2. Permanent governmental restriction on land use which is currently engaged in;
3. Temporary governmental restriction.

Regulatory Takings – Restriction on Anticipated Use

General Rules: 1. “Taken” land use must have been permissible prior to enactment of challenged regulation;
2. Land use must not be a “nuisance;”
3. In NY, restriction must be “one step short” of reducing the property value to zero



***Briarcliff Associates*, 272 AD2d 488 (2d Dept. 2000)**

- Property owner purchases land being used as emery mine.
- Owner intended to convert mine to crushed stone quarry → 20x more income.
- Shortly after purchase, local municipality rezones parcel residential, prohibiting mining (but still allowing emery mine); also prohibited heavy trucks
- “The fact that a regulation deprives the property of its most beneficial use does not render it [an] unconstitutional” taking.
- Property was purchased for 400k. Still worth at least 400k residentially zoned.
→ Therefore, not exhausted of ALL value.
- P not entitled to recovery based upon greater value that might have been yielded by quarry.

Regulatory Takings – Restriction on Anticipated Use – NY Case 2

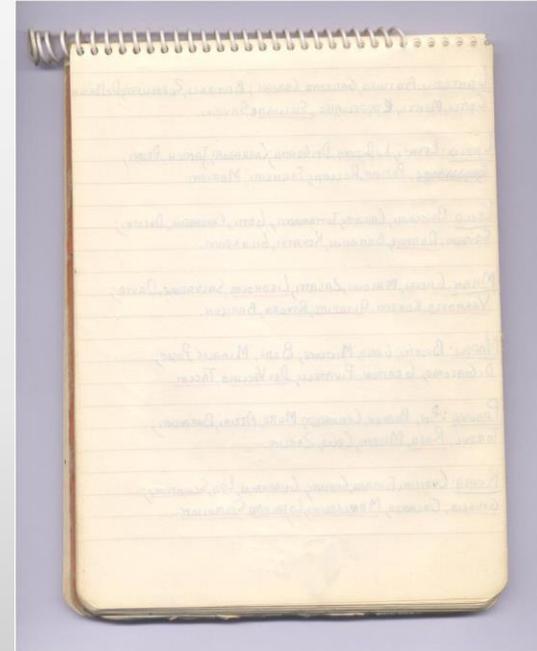
Putnam County Nat'l Bank v. City of NY, 37 AD3d 575 (2d Dept. 2007):

- Putnam Bank acquires undeveloped parcel pursuant to foreclosure
- Bank applies for and is granted subdivision for 37 parcels
- Subdivision allows for central sewage system on parcel
- Shortly after approval, but before construction, Watershed Regulations enacted that prohibited the approved central sewer system
- Bank proceeds to develop parcel alternatively with 20 less parcels
- Bank sells subdivision -- sues NY City for a taking:
 - The Watershed Regulations and prohibition on the central sewer system reduced property value by 80%
- Court finds in favor of NYC – No Taking!
 - A land use regulation is “not rendered unconstitutional merely because it causes the property’s value to be ‘substantially reduced’,”
 - or because ‘it deprives the property owner of its most beneficial use.’”
 - The reduction in value was insufficient as a matter of law to create a taking claim.



Regulatory Takings – Restriction on Anticipated Use – Take Home Points

- NY Courts favor “Whole” taking analysis – anything less is very difficult to show a taking in NY
- Generally no entitlement to greater value that may have resulted from prohibited activity where parcel has some other value
- Taking “most beneficial use” is not necessarily an illegal taking
- 80% reduction in value is not enough!



Energy extraction companies have their work cut out for them if they want to succeed with taking claim for anticipated hydrofracking use.

Still hope – Chance NY Courts will more carefully consider Penn State “Too Far” Taking Analysis where “Whole Taking” is not required and instead “Golden Stick” may be enough.

Regulatory Takings – Restriction on Actual Use / Vested Rights

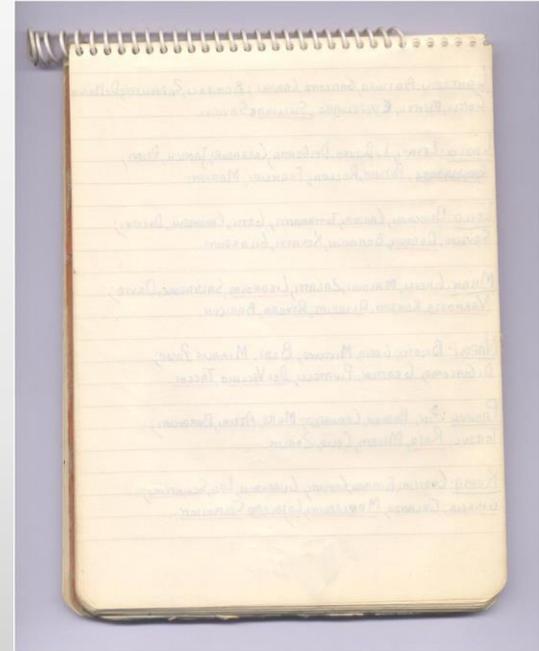
A Primer and a Great Example - *Jones v. Town of Carroll*, 15 N.Y.3d 139 (2010):



- Jones' purchase land and operate as a landfill for some time, set aside significant portion for future use as landfill reaches capacity
- Town adopts zoning law that prohibits expansion of landfills in the Town
- Jones sues – illegal taking of vested rights in use of land as landfill
- **Court sets forth rules re Takings of Vested Rights:**
 - **Use must legally exist at the time of the enactment of the infringing regulation**
 - [Here landfill was in operation at the time, but certain areas of parcel were not being so used]
 - **Use must not be “merely contemplated”**
 - **Where only PART of a parcel is being so used, owner must show:**
 - **Use is unique and adaptable to the entire parcel**
 - **Owner must have taken action to show intent to use entire parcel for use**
- Court finds that landfill meets above rules → Landfill existed prior to 2005, landfill is unique in that it actually “consumes” the real property as it is being operated, and owner showed intent for continued/future use (purchased heavy equipment, plans for multi-stage enlargement, discussions with investors regarding future operations)

Regulatory Takings – Actual Use / Vested Rights – Take Home Points

- Use must exist at the time of the enactment of the infringing regulation in order to have constitutionally protected “Vested Rights”
- Vested Rights may extend to entire parcel, even where only part of the parcel is being used
- A permit, with some additional activity (start construction), may establish vested rights.



Towns will have their work cut out for them if, in the event NY lifts the ban and the DEC issues permits (which are then issued in that Town’s jurisdiction), the Town only *then* restricts hydrofracking activity.

Act now to avoid Vested Rights issues!

Regulatory Takings – Moratoria

Zoning Powers → Generally Follow Previously Discussed Takings Analysis (Anticipated Use / Actual Use)

VS



Police Powers → General Rules:

1. Response to “dire necessity;”
2. Reasonably calculated to alleviate or prevent a crises condition; and
3. Steps presently being taken to address problem

Jeffrey v. Ryan, 2012 NY Slip Op 51881(U) (Broom County Oct. 2, 2012):

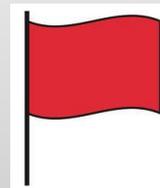
- “A municipality may not invoke its police powers solely as a pretext to assuage strident community opposition.”

- Court Noted the following failings:

- “No explanation of how threat will be eliminated when moratorium expires in 2 years.”

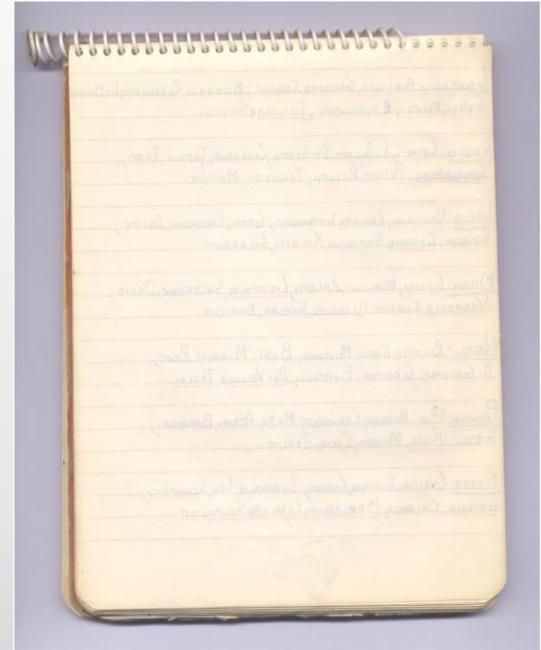
- “City is not engaging in any investigation, studies or other activities in the interim in order to determine if there is a way to alleviate any harm to the people of the city from this future activity.”

- “There can be no showing of dire need since the New York State Department of Environmental Conservation has not yet published the new regulations that are required before any natural gas exploration or drilling can occur in this state. “



Regulatory Takings – Moratoria– Take Home Points

- Cannot be enacted solely to address community opposition!
- Town should/must set forth a plan of steps, such as studies or the revision of its Comprehensive Plan, which will be addressed during the moratorium.
- Create a record upon the adoption of the moratorium which sets forth valid reasons *why* the moratorium is being implemented.



“There can be no showing of dire need since the New York State Department of Environmental Conservation has not yet published the new regulations that are required before any natural gas exploration or drilling can occur in this state.”

The above quote is troubling to Towns that are now adopting moratoria via the Police Power. However, unclear if it precludes the adoption of moratoria before DEC begins issuing permits.

Conclusion and Closing Thoughts



- Local Municipalities have Many Options to address Hydrofracking.
- Takings Law is Complex and it is Difficult to Predict the Outcome of a Particular Matter, but still Possible to Mitigate Risk:
 - Adoption of Local Regulations before DEC Regulations are Issued
 - Fill up the Record with Sound Reasoning
 - Stay informed – Case Law Development on Pre-Emption, Case Law Development on Takings (Fed and NY), NY Legislation, DEC Regulations
- #1 Piece of Advice – Make a Plan!

“By failing to prepare you are preparing to fail.”

— Benjamin Franklin



Thank You! Questions?



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Donald A. Young is an Associate in Boylan Code LLP's Public Law, Litigation, and Real Estate groups, concentrating his practice on municipal and land use law, general litigation, and real estate matters. A graduate from the University of Rochester (B.A., 2004, double major in Economics and Honors Psychology), Mr. Young earned his law degree from the State University of Buffalo Law School (J.D., *cum laude*, 2007), where he was an Editor of the *Buffalo Law Review*.

Mr. Young has excelled early in his career, developing expertise in municipal law and zoning and land use law through his daily experiences in working through complex municipal and land use issues, often in concert with public officials, staff and consultants such as engineers. For example, Mr. Young has drafted, revised and implemented a wide range of legislation, including refuse regulations, wind turbine regulations, and moratoria. Furthermore, he has developed expertise in a wide variety of other areas dealing with governmental entities, for example, by advising the local legislative body with respect to rezoning applications, rendering opinions on FOIL and ethics issues, implementing special districts (water, sewer, etc.) advising and acting as Planning Board attorney on a number of site plan and subdivision issues, advising and acting on behalf of the Zoning Board of Appeals with regard to various zoning and variance issues, and by working with Code Enforcement to implement and enforce local ordinances.

Mr. Young has shared his knowledge and experience in articles published in the *Daily Record*, the *Rochester Business Journal* and the Association of Towns *Talk of the Towns* on topics including the Marcellus Shale and technology in government. Additionally, Mr. Young has presented on the Marcellus Shale.