

# Innovative Zoning Techniques

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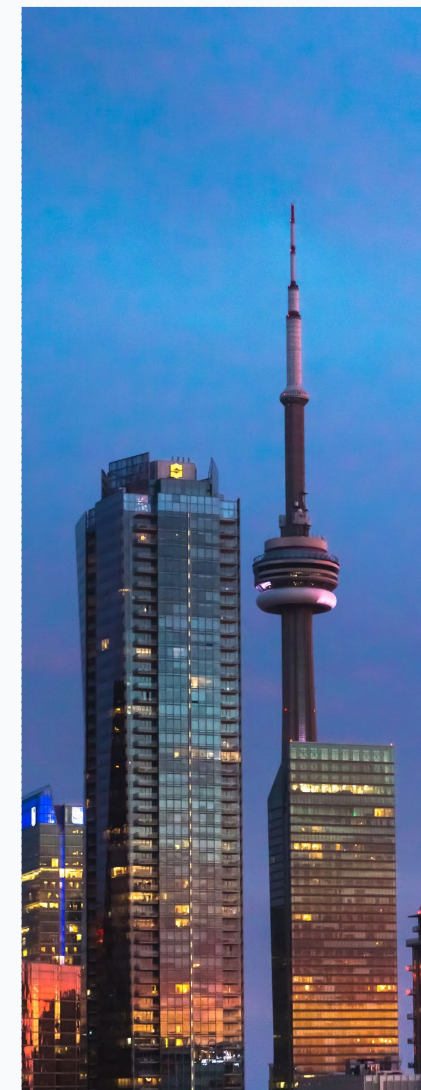
# Introduction to Hodgson Russ

## BROAD-RANGED, FULL SERVICE FIRM WITH DEEP CAPABILITIES

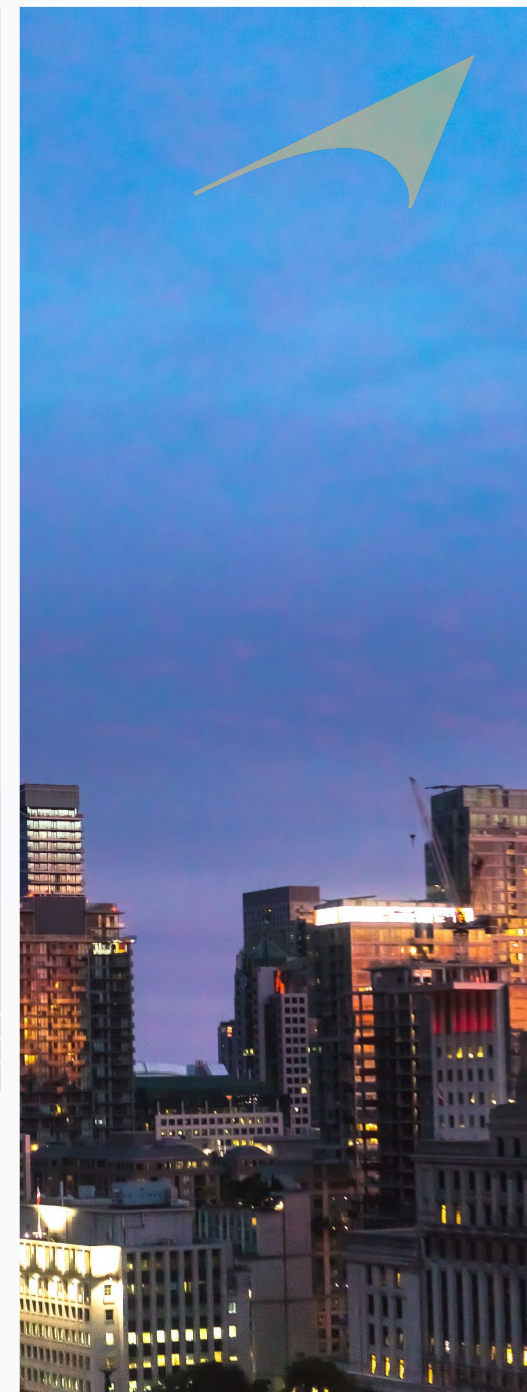
- Founded in 1817, Hodgson Russ has 200+ attorneys practicing in all major areas of U.S. law
- Offices in Toronto, Buffalo, New York City, Albany, Rochester, Saratoga Springs, Hackensack, Greensboro, and Palm Beach
- Experience in markets across North America, Europe and Asia
- Member of Society of Trust and Estate Practitioners (STEP Canada)
- Various attorneys are members of the Ontario Bar Association
- Instrumental in completion of the Erie Canal, Robert Moses Niagara Power Plant, Buffalo's City Charter, the founding of Wells Fargo and Citibank, and development of many major industrial, health care, educational and cultural organizations

## FREQUENTLY RECOGNIZED FOR EXCELLENCE IN PRACTICE OF LAW

- *Best Lawyers*, "Best Lawyers in Canada," Best Lawyers in America" and "Best Law Firms"
- *American Lawyer's* "2020 AmLaw 200" and the "A-List for Female Equity Partnership"
- *The National Law Journal's* "NLJ 500"
- *Chambers USA: America's Leading Lawyers for Business*
- *Super Lawyers*



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# Introduction to the Land Use Practice

## PRACTICE AREAS

Multidisciplinary team cost-effectively guides clients through virtually every aspect of a project's lifecycle:

- Strategic Planning
- Zoning and State Permitting
- State and Federal Regulatory
- SEQRA Environmental Review
- Financing
- Lease and Easement Agreements
- Title Insurance and Curatives
- Contracts and Agreements
- Taxation
- Litigation
- Insurance
- Corporate Structuring and Collaborations
- Purchase, sale and related due diligence

## PROJECTS

Experienced in wind, solar, energy storage, landfill gas-to-energy, bioenergy projects, electric vehicle infrastructure, energy efficiency and decarbonization strategies

## CLIENTS

**Clients:** Developers, lenders, acquirers, landowners, permitting agencies, development agencies, parts and service suppliers, manufacturers, contractors and investors

## INTERNATIONAL EXPERTISE

**International Expertise:** Counsel foreign entities participating in United States projects involving cross-border finance, CFIUS, FACTA Compliance, immigration issues, licensing and technology transfer, protection of foreign patents, international taxation and Tax Treaty compliance, multinational mergers and acquisitions, NAFTA and other trade issues

# What is Incentive Zoning



- Authorized by Town Law § 261-B, Village Law § 7-703, General City Law § 81-D
- “Incentive zoning” shall mean the system by which specific incentives or bonuses are granted, pursuant to this section, on condition that specific physical, social, or cultural benefits or amenities would inure to the community.
- Law lays out in detail how to implement an incentive zoning law and what it can be used for.



# Incentive Zoning

- **Incentive zoning is a system by which municipalities can allow deviations from the use and bulk requirements of the zoning code (known as bonuses or incentives) in return for the developer providing amenities that the municipality could otherwise not require. New York communities have employed incentive zoning most successfully in creating affordable housing, but have also gained other community benefits, ranging from conservation of important habitat to preservation of the Broadway Theatre District.**

# Incentive Zoning



- **“Incentive zoning is based on the premise that certain uneconomic uses and amenities will not be provided by private development without economic incentive. The economic incentive frequently used ... is the allowance of greater density within a proposed building, more floor area than permitted under general zoning rules, if developers provided certain amenities for the community. The amendment awards bonus points which entitle developers to expand their construction in return for increased construction of other, uneconomic projects such as low-cost housing, slum rehabilitation or public facilities.”**
- ***Asian Americans for Equality v. Koch*, 72 N.Y.2d 121527 N.E.2d 265, 531 N.Y.S.2d 782 (1988)**

# Using Incentive Zoning



- Essential to the incentive zoning concept is that the amenities gained must be true additionalities; that is, they are benefits the municipality cannot require as valid extractions or mitigating conditions under the zoning statutes<sup>3</sup> or the State Environmental Quality Review Act (“SEQRA”).<sup>4</sup> Indeed, SEQRA’s mandate that all approvals must be restrained by obtaining the maximum practicable mitigation of impacts,<sup>5</sup> precludes measures that address project-caused impacts, such as traffic mitigation, from qualifying as an “amenity” justifying a grant of incentives. Further, since mitigation of negative impacts is not merely authorized but mandatory, incentive zoning cannot be employed in a manner that would create additional harm to a host neighborhood.

# Using Incentive Zoning



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# Local Incentive Zoning Statutes

- The incentive zoning power is not self-executing. To offer the incentives and receive the benefits, a municipality must enact an incentive zoning system as part of the local zoning scheme.
- Incentive zoning enactments must comply with the normal procedures for amending the zoning ordinance or enacting a local law, including all applicable environmental, notice and public hearing requirements.



# Local Incentive Zoning Statutes

- **The incentive zoning power is not self-executing, a local jurisdiction can only offer the incentives and receive the benefits by enacting an incentive zoning system as part of the local zoning scheme.**
- **Incentive zoning enactments must comply with the normal procedures for amending the zoning ordinance or enacting a local law, including all applicable environmental, notice and public hearing requirements, as well as the state-law requirements.**

# Local Incentive Zoning Statutes



## Local provisions must

- **(1) Specify the incentives that may be granted to the applicant;**
- **(2) Specify the community benefits/amenities that the applicant may offer the Town;**
- **(3) Indicate the criteria for approval and method of determining the adequacy of community amenities to be accepted in exchange for zoning incentives granted by the Town;**
- **(4) Describe the procedure for obtaining incentives, including the application and review process, and placing terms and conditions on any approval; and**
- **(5) Provide for a public hearing, with a requirement that notice of said hearing be given by publication in the official newspaper at least five days in advance of the hearing.**



# Adopting Incentive Zoning

- A local code must identify those zoning districts where bonuses may be granted, information that should be incorporated into the local zoning map.
- While all planning is required to be compliance with your comprehensive plan, the incentive zoning enabling statute specifically commands it: “The purpose of the system of incentive, or bonus, zoning shall be to advance the [municipality’s] specific physical, cultural and social policies in accordance with the [municipality’s] comprehensive plan and in coordination with other community planning mechanisms or land use techniques. The system of zoning incentives or bonuses shall be in accordance with a comprehensive plan
- ‘



# The Cash Payment Option

- State law allows payment into a fund where there is no way to directly provide the amenity.
- Town of Ogden Zoning Code § 211-9:
- Cash in lieu of amenity or bonus. If the Town Board finds that a community benefit is not suitable on site or cannot be reasonably provided, the Town Board may require a cash payment in lieu of the provision of the amenity or bonus. These funds shall be placed in a trust fund to be used by the Town Board exclusively for amenities specified in these provisions. Payments shall be made by the applicant prior to the issuance of any permit, stripping of any ground cover, site grading, or any other site improvements or construction activities.

# Sample Amenities



- Affordable housing is the most common amenity, but here are other examples from the Town of Beekman:
- (1) Permanent conservation of natural areas or agricultural lands; (2) Provision of passive or active open space and related improvements; (3) Permanent protection of scenic views; (4) Public Parks and recreational facilities; (5) Public access to waterfronts; (6) Public trails and trail linkages; or (7) Cultural or historic facilities deeded to municipality or qualified not for-profit agencies.

# What is Planned Unit Development



- **Authorized by Town Law § 261-C, Village Law§ 7-703-a, General City Law § 81-F**
- **“Planned unit development district regulations are intended to provide for residential, commercial, industrial or other land uses, or a mix thereof, in which economies of scale, creative architectural or planning concepts and open space preservation may be achieved by a developer in furtherance of the town comprehensive plan and zoning local law or ordinance.”**
- **Not exactly a definition, no case has cited to any of the three sections**



## Why PUDs?

- PUDs allow for more flexibility and creativity in land development than standard zoning district regulations. PUDs can be used to achieve community goals and priorities, such as: Clustering buildings, Incorporating a variety of building types, promoting energy-efficient systems, allowing mixed land uses, and creating housing for specific resident groups.
- PUDs Can be created in any zone and they can limit their use, for example only allowing puds in industrial or residential zones.
- By eliminating the need for rezonings and variances, PUDs can significantly improve the efficiency of a planning review.





## Implementing PUDs

- As with incentive zoning, the authority to adopt PUDs requires a local law setting out the procedure, where a PUD can be placed, and what bulk and use restrictions can be relaxed by use of the PUD.
- PUDs are usually designed to create larger scale developments, thus a minimum size is common.
- The PUD enabling local law must state its purpose, the bulk and use standards, and describe the review process.



# The Review Process

- An essential portion of any local PUD statute is outlining the review process.
- Common approaches are to split the review into a concept plan and a detailed plan, not unlike preliminary and final subdivisions, to allow for sufficient public input and changes early on in the process.
- Most statutes allow that PUDs can be implemented by developers in phases.
- Amenities and other benefits, particularly in conjunction with incentive zoning laws, should be outlined throughout the process.

## Using the CLCPA in New York Zoning

- **Incorporating the Climate Leadership and Community Protection Act (CLCPA) into local plans and zoning decisions and regulations provides a powerful tool for improving community resiliency and shifting adaptation and mitigation costs to the private sector**

# CLCPA Overview

- The CLCPA is New York State's primary policy legislation, setting an aggressive target of 85% reduction in greenhouse gas emissions by 2050, and an interim target of 40% reduction by 2030. The CLCPA also mandates that 70% of all electricity generated in New York come from renewable sources by 2030.
- The CLCPA sets out the regulatory path to reach these goals, but contains no specific rules itself. Can the CLCPA's policy mandates nevertheless be the basis for permit actions and local statutes – particularly in the generation of electricity? Will it override local determinations?



# CLCPA – Basics

The Climate Leadership and Community Protection Act (CLCPA)

Adopted in June 2019, effective Jan. 1, 2020

A broad, all-encompassing effort to push the state to reach aggressive greenhouse gas (GHG) emissions reductions by a date certain



# CLCPA – Basics

- Amended the Environmental Conservation Law (ECL)
  - Created the Climate Action Council (CAC)
  - Authorized the NYS Dep't of Environmental Conservation (NYSDEC) to establish GHG emissions limits and promulgate regulations to enforce them
- Two key sections for purposes of our discussion
  - CLCPA Section 7(2) Permits must be consistent with CLCPA
  - CLCPA Section 7(3) Permits shall not disproportionately burden disadvantaged communities
- Municipalities can use these goals in local decision-making





## CLCPA Section 7(2)

- In considering and issuing permits ... all state agencies ... shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide [GHG] emissions limits established [herein].
- Where such decisions are deemed to be inconsistent with or will interfere with the attainment of the statewide [GHG] emissions limits ... each agency ... shall provide a detailed statement of justification as to why such limits/criteria may not be met, and identify alternatives or [GHG] mitigation measures to be required where such project is located.



## CLCPA Section 7(3)

- 3. In considering and issuing permits, licenses, and other administrative approvals and decisions, including ... grants, loans, and contracts... all state agencies, offices, authorities, and divisions shall not disproportionately burden disadvantaged communities as identified pursuant to subdivision 5 of section 75-0101 of the environmental conservation law. All state agencies, offices, authorities, and divisions shall also prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities."





## CLCPA in Action

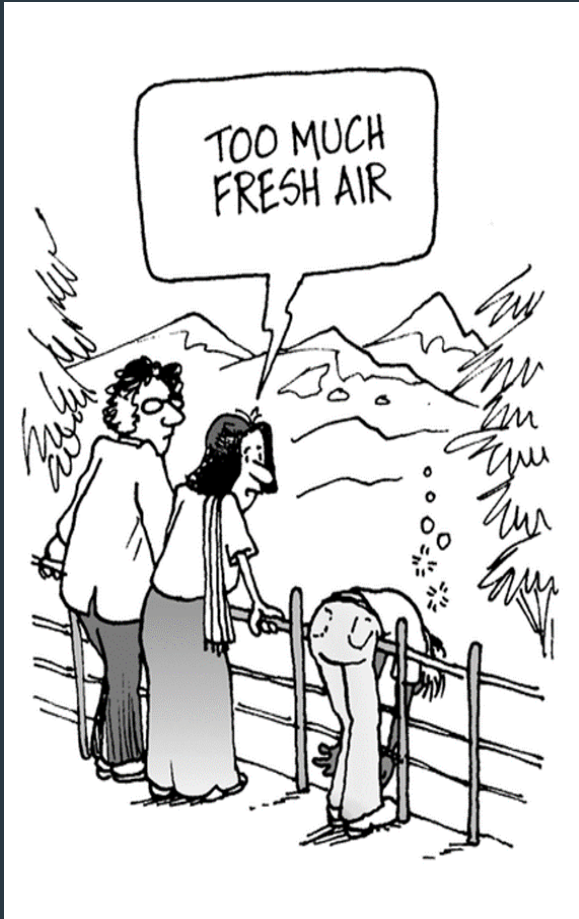
- How has this played out? Does this really give agencies the authority to deny permits?
- NYSDEC believes so, and at least one NY State Court and one Administrative Law Judge has agreed...
- To date, NYSDEC has denied Title V Air Permits for the following facilities based on CLCPA § 7(2):
  - Astoria Gas Turbine Power, LLC
  - Danskammer Energy, LLC
  - Greenidge Generation LLC
  - Brooklyn Union Gas Co.

# Can Municipalities Follow This Pattern?



- If NYSDEC is categorically denying Title V Air Permits to fossil fuel-based power plants based on CLCPA 7(2), can municipalities adopt that strategy? Danskammer denial was upheld despite no DEC regulations in place
- Some argue DEC action is a de facto rule without the SAPA process, but municipalities would be using SEQRA and review process, as well as zoning powers.
- NYSDEC has noted in its permit denials that these are case by case analyses based on the facts of the application/facility. And that of course is exactly how municipalities address most planning decisions.

# How To Go About Employing The CLCPA



- **The CLCPA is not a self-executing statute granting powers to municipalities. Two key methods for implementation:**
  - **Through incorporation in the master plans and zoning regulations**
  - **As a consideration in project reviews, particularly using SEQRA**

# Comprehensive Plan Provisions

- To grant maximum authority for employing the CL CPA in land use determinations, the goals of the CLCPA can be incorporated into a community's comprehensive plan, either as an overall goal or specific provisions. Consider a general provision such as the CLCPA itself provides:
- “Climate change is adversely affecting economic well-being, public health, natural resources, and the environment of New York. The adverse impacts of climate change include:
  - a. an increase in the severity and frequency of extreme weather events, such as storms, flooding, and heat waves, which can cause direct injury or death, property damage, and ecological damage (e.g., through the release of hazardous substances into the environment);
  - b. rising sea levels, which exacerbate damage from storm surges and flooding, contribute to coastal erosion and saltwater intrusion, and inundate low-lying areas, leading to the displacement of or damage to coastal habitat, property, and infrastructure;

# Comprehensive Plan Sample (cont'd)




- **c. a decline in freshwater and saltwater fish populations;**
- **d. increased average temperatures, which increase the demand for air conditioning and refrigeration among residents and businesses;**
- **e. exacerbation of air pollution; and**
- **f. an increase in the incidences of infectious diseases, asthma attacks, heart attacks, and other negative health outcomes. These impacts are having a detrimental effect on some of New York's largest industries, including agriculture, commercial shipping, forestry, tourism, and recreational and commercial fishing. These impacts also place additional strain on the physical infrastructure that delivers critical services to the citizens of New York, including the state's energy, transportation, stormwater, and wastewater infrastructure."**

# Specific Plan Provisions



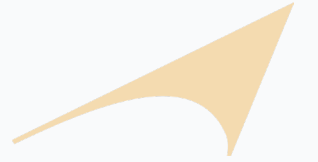
- Energy Efficiency: To promote energy efficiency in buildings, appliances, and municipal activities, the Town shall
  - Establish mandatory energy efficiency standards for public buildings and appliances.
  - Implement building codes that promote energy-efficient construction practices such as the NY Energy Stretch Code.
  - Seek grants and offer financial incentives and programs for energy efficiency upgrades in homes and businesses.
  - Develop public awareness campaigns to encourage energy-saving behaviors.

# CLCPA Adaptation and Resilience Section in a Comprehensive Plan



- **Climate Risk Assessment:** In order to identify and assess potential climate risks, the Town shall
  - Conduct a comprehensive climate vulnerability assessment to understand the potential impacts of climate change on infrastructure, ecosystems, and communities.
  - **Resilience Building:** Invest in infrastructure upgrades to improve its resilience to extreme weather events like floods, heat waves, and storms.
  - Develop natural resource management plans to protect ecosystems from climate change impacts.
  - Implement community-based adaptation programs to address the specific needs of vulnerable populations.

# SEQRA and the CLCPA



As the basic purpose of the State Environmental Quality Review Act (“SEQRA”) is to incorporate consideration of environmental factors into an agency's planning, review and decision-making process at the earliest possible time, SEQRA review is the ideal to address whether proposed projects are consistent with the goals of the CLCPA.

One way to do so to do so is to require applicants to address the project’s consistency with the goals of the CLCPA



# SEQRA and the CLCPA



- Can the CLCPA support of the selection of the “no action” alternative under SEQRA? Under the *Danskammer* decision, it appears the answer is yes. If a record demonstrates significant likelihood of conflict with the State emission reduction goals, a denial would be supported.
- In such circumstances, the record must clearly show the inconsistency. The courts are unlikely to be fooled by generalized public opposition masquerading as CLCPA compliance.

# Use the DEC GHG Policy



- DEC Issued a Policy “Assessing Energy Use and Greenhouse Gas Emissions in Environmental Impact Statements” It was guidance for when the DEC acts as lead agency, but also can be used by a municipality where a project identifies energy use or GHG emissions as significant in a positive declaration or, as a result of scoping, as an issue for the EIS.
- The Policy concentrates on:
  - establishing the boundaries for the assessment;
  - quantifying indirect and direct emissions from the project;
  - quantifying emissions from waste generation;
  - quantifying methane emissions from landfills; and
  - providing a menu of possible mitigation options (and the policy has a long list).

# Sample Zoning Provisions

One of easiest methods to bring the CLCPA into land use determinations is simply to add it to the list of criteria to be considered in granting approvals:

**In considering whether to approve a [special use permit][site plan][subdivision] the [Town Board][Planning Board][Zoning Board of Appeals] shall consider the following factors:**

**a. Whether the proposed development is consistent with the goals of the CLCPA**

**In considering conditions on the approval of a [special use permit][site plan][subdivision] the [Town Board][Planning Board][Zoning Board of Appeals] shall consider conditions which mitigate inconsistencies with the goals of the CLCPA.**



# Solar And Energy Storage Ready Buildings



- The CLCPA would appear to support local initiatives requiring that new construction be solar and energy storage ready. These provisions do not require that houses or buildings be built with solar panels, or include energy storage options, but rather that the wiring of the house be sufficient to handle the systems.
- This has gotten a lot of pushback from builders and some advocacy groups who note that such requirements push up the cost of housing at a time of significant housing shortage.

# Solar And Energy Storage Ready Law



- **Solar and Energy Storage Readiness in New Residential Construction**
- **X.X.1 Applicability:**
- **This section applies to all new construction of single-family and multi-family residential units within the Town requiring a building permit.**
- **X.X.2 Definitions:**
- **a) Solar-ready: A residential unit designed and constructed to facilitate the future installation of a solar photovoltaic (PV) system, including:**
  - 1. Adequate roof space with appropriate orientation and structural capacity for solar panels.**
  - 2. Conduit pathways pre-installed from the roof to the electrical panel.**
  - 3. Shutoff disconnect readily accessible for future solar system integration.**

# Solar And Energy Storage Ready Law (cont'd)



- **b) Energy storage-ready: A residential unit designed and constructed to facilitate the future installation of an energy storage system, including:**
  - 1. Dedicated space for the battery storage unit.
  - 2. Electrical connection point readily accessible for the battery system.
  - 3. Adequate electrical panel for energy storage
- **X.X.3 Solar and Energy Storage Readiness Requirements:**
  - (a) All new construction of single-family and multi-family residential units shall be designed and constructed to be solar-ready.

# Solar And Energy Storage Ready Law (cont'd)



- **b) Energy storage-ready: A residential unit designed and constructed to facilitate the future installation of an energy storage system, including:**
  - **1. Dedicated space for the battery storage unit.**
  - **2. Electrical connection point readily accessible for the battery system.**
  - **3. Adequate electrical panel for energy storage**
- **X.X.3 Solar and Energy Storage Readiness Requirements:**
- **(a) All new construction of single-family and multi-family residential units shall be designed and constructed to be solar-ready.**



# EV Chargers

- **Section X.X: Electric Vehicle Charging Infrastructure**
- **X.X.1 Applicability:**
- **This section applies to all new construction and substantial renovations of multi-family and commercial developments requiring a building permit within the Town**
- **X.X.2 Definitions:**
- **Electric Vehicle Charging Station (EVCS): A facility with equipment designed to transfer electrical energy to the battery of an electric vehicle.**
- **Substantial renovation: Any renovation project that costs more than [percentage] of the assessed value of the existing building**







## EV Chargers (cont'd)

- **X.X.3 Minimum EV Charging Requirements:**
- **(a) Multi-family developments:**
- **New construction and substantial renovations of multi-family developments with [number] or more parking spaces shall provide a minimum of [number] EVCS.**
- **At least [percentage] of the required EVCS shall be Level 2 chargers.**
- **(b) Commercial developments:**
- **All new construction and substantial renovations of commercial developments with [number] or more parking spaces shall provide a minimum of [number] EVCS.**

# EV Chargers (cont'd)



- **X.X.4 Location and Design:**
- **(a) EVCS shall be located in convenient and accessible locations within the parking lot, considering factors such as proximity to building entrances, pedestrian walkways, and accessibility for people with disabilities.**
- **(b) EVCS shall be clearly identified with signage in accordance with applicable regulations.**
- **(c) The installation of EVCS shall comply with all applicable electrical codes and safety standards.**

# Gas Bans



- A number of municipalities are considering bans on new construction and substantial reconstructions utilizing natural gas as a fuel source. The goal is to limit the use of fossil fuels in the future by eventually replacing gas with electric. The emissions reduction goals of the CLCPA would certainly appear to support such local measures.
- Such bans have run into significant legal issue as being preempted by federal Energy Policy and Conservation Act (“EPCA”), 42 U.S.C. §§ 6201-6422. The Ninth Circuit invalidated the City of Berkeley’s prohibition on gas piping in new buildings. *Cal. Rest. Ass’n v. City of Berkeley*, 65 F.4th 1045 (9th Cir. 2023), the state of New York is now being sued for its recent limitation of new gas infrastructure and appliances.
- It maybe best to stay on the sidelines until the legal air is cleared on this issue.



THANK YOU!

Questions?

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