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Practitioners Need Broader Expertise:
Real Estate Law Is Undergoing Profound Changes

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Abstract: This article discusses the sweeping modifications to real estate law practice as legislators, courts, and lawyers attempt to accommodate a number of real world challenges. The authors' discussion analyzes several of these transitioning influences, such as an increase in environmental concerns, shifts in environmental legislation, the subprime mortgage crisis, the effect *Kelo v. New London* has on the lawyers' role in facilitating redevelopment, as well as the influence of new E-sign laws has on drafting real estate documents.

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In structuring the curriculum for our law school's new LL.M. Program in Real Estate Law, we have interviewed countless practitioners, reviewed recent statutes and cases, and paid close attention to news accounts in this and other law journals that disclose what lawyers do in the field of real estate transactions, finance, development, and regulation. Our conclusion is that the practice has undergone radical change in the past decade, challenging practitioners to broaden and deepen their expertise. This short survey of the complexity in real estate practice is anecdotal, but reveals that in every phase and dimension of the practice new challenges and problems abound.

Environmental and energy concerns, for example, are ascendant. In 2007 alone, the New York State legislature passed legislation concerning climate change, community land preservation, clean energy, brownfields, hazardous substances, and wildlife management.[1] State and local governments are requiring more buildings to be green[2] and there are federal and state tax benefits for green buildings.[3] Some adopt by reference the Leadership in Energy and Environmental Design (LEED) rating system, developed by the U.S. Green Building Council. The LEED system considers such things as: water and

[1] *See* Michael B. Gerrard, "New York State Environmental Legislation in 2007, NYLJ 3, Col. 1, January 25, 2008.
[2] *See e.g.*, New York City Local Law No. 86.
[3] Energy Policy Act of 2005, 42 U.S.C. §15801, 26 U.S.C. §179D; New York State Green Building Tax Credit Law, http://www.dec.ny.gov/energy/1540.html.

energy efficiency, sustainability of the site, construction materials and indoor environmental quality.[4]

Recent court decisions have interpreted New York's environmental quality review act, SEQRA, to require a stringent assessment of the environmental impacts before a municipality can approve a development proposal. The list includes the most obvious kinds of impacts, such as drainage, flooding, traffic congestion, and pollution, but also more abstract, socio-economic, displacement impacts, as well as climate change.[5] Under New York's environmental requirements, more than just disclosure of potential negative impacts is required, but also plans for mitigation.[6] New York may not be far behind California, where over 200 development proposals have been required to mitigate their impact on climate change by reducing parking and traffic congestion, vehicle miles traveled, greenhouse gas emissions, and fossil fuel consumption.

Recently enacted laws and state policies make the purchase and development of brownfields[7] by clients a sensible decision: they are cheaper to acquire and the state encourages reclaiming them under the "brownfields law,"[8] by offering protection from future liability[9] and tax credits for investment and clean up expenditures.[10]

Modern land use regulations aim to control incompatible uses, maintain desirable density levels, and establish and preserve neighborhood aesthetic and community character. In the last few years, land use issues confronted by regulators and the courts have included over-sized homes;[11] the location of big box retailers (like Wal-Mart); open space preservation;[12] and affordable housing requirements.[13] Because land use regulations carry a presumption of validity, it has not been an easy task for the attorney to convince the regulators or the courts that a measure should be invalidated or made more reasonable. A few efforts have been successful.[14]

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[4] *See* http://www.usgbc.org/LEED.

[5] *See e.g., Matter of Develop Don't Destroy (Brooklyn) v. Urban Development Corp.*, 2008 N.Y. Misc. 551, 239 N.Y.L.J. 15 (Sup. Ct. N.Y. Co. 2008)(wind effects; impacts on community garden); *Matter of Chestnut Ridge v. Town of Ramapo*, 45 A.D. 3d 74 (2d Dept. 2007)(community character).

[6] *See* John Armentano, "Act's Mandate Extends Beyond Mere Disclosure," NYLJ 5, col. 4, March 28, 2007.

[7] Brownfields are lands formerly used for activities that produced hazardous wastes.

[8] Brownfield Cleanup Program Act, Environmental Conservation Law, §§27-1401.

[9] Environmental Conservation Law, §27-1421.

[10] N.Y. Tax Law §21, 22, 187-g, 187-h.

[11] These relate to the so-called "McMansions", homes with large square footage on relatively small lots.

[12] *See* Charlotte A. Biblow, "Preserving Open Space, " NYLJ 24, Col. 1 (October 16, 2007).

[13] Municipalities require a developer who seeks to construct market rate housing to set aside a percentage to be affordable by low and middle-income families. In White Plains, that percentage was recently raised from 6 percent to 10 percent.

[14] *In the Matter of North Country Citizens for Responsible Growth, Inc. v. Town of Potsdam Planning Board*, 39 A.D.3d 1098 (2d Dept 2007)(grant of area variance and approval for the construction of a Wal-Mart Supercenter); *Citizens for Aquifer Protection and Employment v. Town of Cortland Town Board*, 16 Misc. 3d 1121A (Sup. Ct. Cortland Co. 2007)(same); *Land Master MONTG I LLC v. Town of Montgomery*, 13 Misc. 3d 870 (Sup. Ct. Orange Co. 2006)(striking down moratorium and laws prohibiting residential development as scheme to preclude affordable housing).

Staying knowledgeable about the subprime mortgage crisis in the last couple of years has required the attorney to monitor developments on all fronts: in the industry (lenders rethinking lending policies), the legislature (providing financial assistance to distressed borrowers) and the courts. This last front may have the more immediate impact on practice as courts show considerable solicitude for the plight of homeowners facing foreclosure (requiring the foreclosing party be the mortgagee,[15] strict adherence to foreclosure procedure[16]) and have been generally receptive to new foreclosure defenses, such as fraud by lenders in ignoring borrowers' financial qualifications.

As lawyers guide their clients and the development team, their knowledge of fact gathering, negotiation, and consensus building has become more important in this complex environment. Despite a plan's careful attention to all of the environmental and land use concerns, public opposition to any development project is almost inevitable. For example, recent proposals for the Atlantic Yards project[17] in Brooklyn and Hudson Yards[18] in Manhattan have been met with highly orchestrated and determined opposition.[19] Meetings with local officials and community groups may be required to assess the political climate and to contrive ways to blunt any opposition, such as negotiating a far-reaching Community Benefits Agreement granting concessions and resources to community and citizens groups.[20]

Most large scale developments, like Atlantic Yards, require that lawyers acquire intimate knowledge of other areas of law and public policy. In the Atlantic Yards project, the city made a commitment to obtain needed land through eminent domain. The power to condemn in this case was upheld by the Second Circuit in *Goldstein v. Pataki*.[21] Relying upon the holding in the United States Supreme Court decision, *Kelo v. New London*,[22] which gave great deference to condemning authorities in deciding what is a

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[15] *Aurora Loan Services v. Grant*, 17 Misc. 3d 1102A (Sup. Ct. Kings Co. 2007).

[16] *See Deutsche Bank v. National Trust Co. v. Williams*, 17 Misc. 3d 320 (Sup. Ct. Kings Co. 2007).

[17] The Atlantic Yards Project involves 22 acres, a 20,000-seat professional basketball arena, hotel, office and condominium towers, with housing at a range of affordability, seven acres of parkland and a 400 space biking station. *See* Thomas Adcock, *Local Lawyers Fight Atlantic Yards Project as Own Law Firm*, NYLJ 20, col. 2, June 8, 2007.

[18] The Hudson Yards project involves the construction of nearly 24 million square feet of new office space, 13,000 new residential units and 24 acres of open space along the Hudson River, in an area consisting primarily of rail yards, industrial buildings and parking lots. *See* Jeffrey Friedlander, "Challenging City Land-Use Initiatives" NYLJ 3, Col 1, December 19, 2007.

[19] Among the opponents of the Atlantic Yards project is a group of lawyers who are residents. But the proposal received strong support from the Mayor, N.Y. Senator, as well as community organizations advocating for affordable housing. *See* Adcock, *supra* note 17. In the Hudson Yards case, a neighborhood association stressed concerns about the impact of the project on parking limitations, originally put into place to reduce traffic and air pollution. Friedlander, *supra* note 18.

[20] The efforts of outside counsel for the developer was credited with winning the approval of the Public Authorities Board for the Atlantic Yards project. *See* Adcock, *supra* note 17.

[21] 516 F.3d 50 (2d Cir. 2008); *see also Matter of Aspen Creek Estates, Ltd. v. Town of Brookhaven*, 47 A.D.3d 267 (2d Dept. 2007)(upholding taking of farmland to preserve rural character); *but see Matter of 49 WB LLC v. Village of Haverstraw*, 44 A.D.3d 226 (2d Dept. 2007)(taking was to assist a private developer; not rationally related to the asserted housing-related public purpose where the landowner's proposal would have resulted in more affordable housing than with taking).

[22] 545 U.S. 469 (2005).

"public use" for taking private property,[23] the Second Circuit was able to identify numerous well-established public benefits secured by the taking, including "redress of blight, creation of affordable housing, creation of a public open space and various mass-transit improvements."[24]

The *Kelo* decision, despite its finding that the condemning authority had thoroughly assessed the effects of economic decline and had adopted a comprehensive plan before taking the property, was nonetheless met with much consternation by private landowners, citizens, and legislators alike, prompting many state and local legislative bodies to adopt measures prohibiting the use of eminent domain power for the purpose of facilitating private development.[25] The New York legislature took up the issue on several occasions, and a bar association task force was convened and reported, but significant reforms were not recommended or adopted.[26]

In the traditional lawyerly tasks of drafting and memorializing transactions there is new complexity. For example, in contracting for the purchase of a brownfield, the attorney should obtain representations from the seller as to how the site had been used, the intensity of that use, when those activities ceased, and what disposal practices were followed, and then try to secure indemnities for clean up costs that exceed certain amounts.

Successful completion of a green development project requires an agreement that identifies the design and performance standards, specifies certification goals, sets out requirements for contractors to follow as to sustainable practices, and articulates what standards and requirements apply as to each component in the construction.[27] Records must be kept at each stage of a project's development, documenting that green standards have been met.

With the federal E-Sign Law (Electronic Signatures in Global and National Commerce Act),[28] enforceable agreements can be created electronically. However, a recent ruling by the Supreme Court in Queens may slow the movement into the electronic age. The court read the New York statute providing for the recognition of agreements

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[23] The Court upheld a taking of private homes with the immediate purpose of turning the land over to a private developer to be used for expensive waterfront development, with the long-term purpose of increasing commercial activities and tax revenues.

[24] 516 F. 3d at 58-59.

[25] Steven J. Eagle and Lauren A. Perotti, *Coping with Kelo: A Potpourri of Legislative and Judicial Responses*, 42 Real Prop., Prob. & Tr. J. 799 (Winter 2008).

[26] The task force recommended that the use of eminent domain should not be restricted to specified public projects, but that agencies exercising eminent domain for economic development purposes should be required to prepare a comprehensive economic development plan and a property owner impact assessment.

[27] *See* Peter S. Britell & Smita G. Korrapati, "What Does 'Green' Mean? Commercial Agreements Often in Conflict", NYLJ 9, Col 2, June 11, 2007; Meredith J. Kane & Nicholas A. Kujawa, "City Takes 'LEED' in Requiring Technologies, NYLJ 5, Col. 2, August 9, 2006. The American Institute of Architects (AIA) has adopted a standard Form of Architect's Services (AIA Document B214 for LEED Certification).

[28] 15 U.S.C. § 7001-7031.

created electronically as not applying to contracts involving conveyances of real property.[29]

As to the recording of instruments, the Westchester County Clerk maintains copies of recordable instruments, electronically, in a computer database, making land titles fairly easy to search. Because documents must still be tendered in paper form with original signatures,[30] practitioners must still back up an electronically created document with one in traditional form.

The absence of electronic recording (that is, tendering documents in electronic form) means potentially weeks between the time of tender and before an instrument is indexed and searchable. Until recently, the prevailing notion was that a deed was not deemed recorded until it had been indexed and made public, that mere tendering was not sufficient. This meant that a notice of pendency[31] filed after a deed was tendered would have priority over the deed in a contest of claimants. However, in two startling rulings, *Avila v. Arsada*[32] and *NYCTL 1998-1 Trust v. Ibraheim*,[33] the Supreme Court in King's County ruled that under section 317 of the Real Property Law, a deed is deemed recorded when tendered, such that a notice of pendency filed after that tender would not have priority, even though, until the deed was made public, there would be no way of knowing about it. These rulings will make buyers who promptly record more secure, but they promise to shake up practices by title companies and mortgagees. They may prompt the legislature to fully enter the modern era and permit electronic recording.

As these trends and changes demonstrate, the attorney's knowledge of real estate must be current, interdisciplinary and technologically sophisticated.

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[29] *Vista Developers Corp v. VFP Realty LLC*, 17 Misc. 3d 914 (Sup. Ct. Queens Co. 2007).

[30] New York has not adopted the Uniform Electronic Transactions Act or the Uniform Real Property Electronic Recording Act, which together would enable the submission in electronic form of documents to be recorded. *See generally* David E. Ewan and Mark Ladd, *Race to the (Virtual) Courthouse, How Standards Drive Electronic Recording of Real Property Documents*, 22 Property and Probate J. 8 (January/February 2008).

[31] A notice of pendency is an instrument filed declaring to the public that there is currently pending litigation regarding the title or right to possession of the identified property and that all who take an interest in the property subsequent to the filing of the notice, will take it subject to the outcome of the litigation. It becomes public almost immediately upon filing.

[32] *See* Marvin N. Bagwell, *Rulings Hold Deed Is Recorded When Delivered*, NYLJ 5, col. 3 (October 10, 2007).

[33] *Id*.