1.
Introduction

The vast majority of highways in New York State are local highways. These highways are either owned or under the control of a county, city, village or town. Of the 114,500 centerline highway miles in New York State, approximately 97,500 of them are considered local highways, broken down as follows:¹

- 58,400 miles of Town Highways
- 20,200 miles of County Highways
- 6,563 miles of Village Highways
- 12,202 miles of City Highways (5,845 in NYC)

The local governments within which these highways are located are responsible for ensuring that they are kept in good repair, safe and passable for use and enjoyment of all users, whether they are residents, visitors, or commercial enterprises. This is not an easy or inexpensive endeavor. According to the NYSDOT, the cost to repair damaged pavement on local roads varies from $70,000 - $150,000 per lane mile for low level maintenance such as a single course overlay, up to $500,000 - $1.9 million per lane mile for full-depth reconstruction. For local bridges, the costs increase. A sampling of 147 local bridges in the counties of Broome, Chemung and Tioga resulted in an average replacement cost of $1.5 million per bridge.²

The cost of maintaining and reconstructing local roads and bridges is typically borne by the local government with jurisdiction over the road. Yet not all users of the roads benefit the same, and some uses are proven to be far more damaging to roadways than others. Heavy truck traffic generally causes more damage to roads because, by some estimates, each passing of a single large truck is the equivalent of approximately 9,000 passing automobiles.³

Yet all roads are constructed to accommodate a particular level of service, based on the anticipated number of vehicle trips and weight of the loads. Local roads typically do not have to deal with the same volume of heavy truck traffic as interstate highways do, and are therefore designed in accordance with standards that more appropriately reflect the nature of the traffic that is expected to travel on it. But what happens when there is a dramatic increase in heavy truck activity that the local road is unable to accommodate, and the local government unable to

² 2011 Revised Draft Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program, Well Permit Issuance for Horizontal Drilling and High Volume Hydraulic Fracturing to Develop the Marcellus Shale and Other Low-Permeability Gas Reservoirs (hereinafter referred to as “2011 Revised Draft SGEIS”), Chapter 6, Section 11 (Transportation Impacts)
³ Id. at Chapter 6.11.3
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afford? This is often the case when certain temporary projects or commercial endeavors are undertaken, particularly the erection of wind turbines, timber harvesting, and of most recent concern, high-volume hydraulic fracturing.

The problem in context

The 2011 Revised Draft Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program (rdSGEIS) for high-volume hydraulic fracturing (HVHF) has identified a number of impacts that HVHF will have on local roads, and has proposed measures to mitigate them. High-volume hydraulic fracturing is expected to lead to a tremendous increase in truck traffic on local roads. From the initial construction of the well pads through the drilling and hydraulic fracturing process, the local roads giving access to the well sites will bear the greatest burden of the truck traffic. The rdSGEIS recognizes this and acknowledges that the anticipated increase in light and heavy duty truck traffic will damage local roads. With each horizontal well, it is estimated that approximately 3,950 heavy truck trips (round trips) will be made, along with approximately 2,840 light truck trips (round trips). If a single well pad includes multiple wells, then the number of trips stated above will be multiplied by the number of wells on the well pad. The majority of these local roads, however, have not been designed for such intense volume of traffic and are unable to accommodate it.\(^4\)

Statewide, using an average well development scenario, it is expected that HVHF will result in 35,686 HEAVY truck trips in the first year, and approximately 178,000 over the first five years. If well development occurs at an accelerated pace, it is expected that approximately 53,000 heavy truck trips will be made in the first year of development and over 266,000 in the first five years. Because of the quantity of water used in HVHF and the proximity of the water to the well pads, the majority of these trips will be made on local roads.\(^5\)

In response to the expected increase in truck activity, many of the counties, towns, cities and villages in which HVHF may occur are beginning to explore what authority they have to regulate truck traffic on their local roads. Part 2 of this tutorial will explore the various sources of authority that the state legislature has conferred to local governments to regulate their roads. Part 3 will take an in-depth look at a how to incorporate that authority into a local law by taking a real-life example and breaking it down so that local legislative bodies will more fully understand the rationale for adopting or including certain provisions.

Local governments are not powerless to protect their roads from damage attributable to particular uses, and need not resign themselves that this is a burden they must bear alone. Nevertheless, the authority that they are given must be exercised judiciously in order to avoid both legal and practical pitfalls. Let’s take a look at some of the options that are available to help local governments protect their roads.

\(^4\) 2011 Revised Draft SGEIS, Chapter 6.11.1.1, table 6.62
\(^5\) Id. at chapter 6.11.1.1, table 6.63
2. Local Options

In a broad sense, there are three primary options available to local governments looking to protect their roads – they can enact traffic regulations, including truck routes, overweight vehicle permits, pursuant to the Vehicle and Traffic Law; they can enact a local law, often referred to as a “Road Preservation Local Law;” or they can enter into a road use agreement. Each of these options will be explained further below.

**Vehicle and Traffic Law Regulations:**

The New York State Vehicle and Traffic Law is the starting point for all road use regulations. It is a state statute that contains broad authority for a local government to regulate traffic on the roads under its jurisdiction. It is also “preemptive” in its scope, and expressly prohibits the adoption of ordinances, rules and regulations that go beyond what it expressly provides. Although the preemptive scope of the Vehicle and Traffic Law may be debatable, even at its most restrictive, it expressly permits certain traffic regulations to be adopted by towns, cities and/or villages. The following is a list of express regulations that local governments may enact:

1. **Overweight Vehicle Permits (N.Y. Veh. & Traf. § 385):** This section governs the dimensions of vehicles that are permitted to operate over all public highways. It prohibits the operation, on public highways, of vehicles that exceed the size and weight limitations set forth therein. The dimensional requirements set forth in this section represent the outer limits for all highways, including state highways. Typically, only extraordinarily large or heavy vehicles will exceed the limits set forth in this section. Permits for oversize vehicles on local roads may be issued by local authorities having jurisdiction over the respective road, and may set forth any conditions or restrictions deemed necessary, including designating the route to be traversed. The permit must be carried on the vehicle at all times, and must be made open to inspection to any officer or employee authorized to enforce this section of law.

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6 The rdSGEIS on HVHF offered three primary means of mitigating the inevitable damage to local roads, but did not include local laws. Rather, well operators required to submit a transportation plan with each application for a drilling permit. The rdSGEIS also considers municipal regulation of traffic under the Vehicle and Traffic Law and road use agreements between the well operator and the municipality to be mitigation measures as well.
2. Establish a System of Truck Routes (N.Y. Veh. & Traf. §§ 1660 (10); 1640 (10)): The Vehicle and Traffic Law authorizes towns, cities and villages to establish a system of truck routes upon which all trucks in excess of 10,000 pounds are permitted to travel, and may exclude overweight trucks from all highways except those that constitute the truck route system. An exception must be made for trucks making local delivery or pickups, and truck routes must provide suitable connection with all state routes entering or leaving such town.

3. Temporary Weight Limitations (N.Y. Veh. & Traf. §§ 1660(a)(11); 1650 (a)(4)): Towns and counties may temporarily exclude from any portion of any town highway any vehicle with a gross weight of over four or more tons, or any vehicle with a gross weight in excess of any designated weight on any wheel, axle, any number of axles, or per inch width of tire when, in its opinion, such highway would be materially injured by the operation of any such vehicle thereon. Such exclusion shall take effect upon the erection of signs on the section of highway from which such vehicles are excluded, and a notice that such vehicles are excluded shall be published in a newspaper in the county where the highway is situated. The exclusion shall remain in effect until the removal of the signs as directed by the town board. Upon written application by any operator of a vehicle subject to this section, the town board may issue a permit providing appropriate exemption to such vehicle, if it is deemed that said vehicle is performing essential local pickup or delivery service and that a failure to grant such permit would create hardship. Every such permit may designate the route to be traversed and contain other reasonable restrictions or conditions deemed necessary. Every such permit shall be carried on the vehicle to which it refers and shall be open to inspection of any peace officer, acting pursuant to his special duties, or police officer. Such permits shall be for the duration of the restriction imposed under this section.

4. Exclude Certain Vehicles from Designated Roads N.Y. Veh. & Traf. §§ 1660(a)(17), 1640(a)(5): Cities, towns and villages may exclude trucks, commercial vehicles, tractors, tractor-trailer combinations, tractor-semitrailer combinations, or tractor-trailer-semitrailer combinations from highways specified by the governing board. Such exclusions shall not be construed to prevent the delivery or pickup of merchandise or other property along the highways from which such vehicles and combinations are otherwise excluded.

5. Exclude Certain Vehicles based upon weight, length, height or limit hours of operation (N.Y. Veh. & Traf. §§ 1660(a)(28), 1650(a)(4-a), 1640 (a)
(20): Counties, cities, towns and villages may exclude trucks, commercial vehicles, tractors, tractor-trailer combinations, tractor-semitrailer combinations, or tractor-trailer-semitrailer combinations in excess of any designated weight, designated length, designated height, or eight feet in width, from highways or set limits on hours of operation of such vehicles on particular highways or segments of such highways. Such exclusion shall not be construed to prevent the delivery or pickup of merchandise or other property along the highways from which such vehicles or combinations are otherwise excluded.

6. Adopt Reasonable Regulations (N.Y. Veh. & Traf. §§1660(a)(25), 1640(a)(16)): Cities, towns and villages may adopt such additional reasonable ordinances, orders, rules and regulations with respect to traffic as local conditions may require subject to the limitations contained in the various laws of this state.

It should be noted here that, by its express terms the Vehicle and Traffic Law provisions preempt local regulation EXCEPT AS PROVIDED BY THE VEHICLE AND TRAFFIC LAW. Looking at item 6, above, the Vehicle and Traffic Law expressly provides cities, towns and villages with the authority to adopt “reasonable” other regulations as local conditions warrant. This provision of law will offer flexibility in regulating truck traffic even in the broadest view of the state preemption. 7

Local Laws

The second tool available to local governments looking to protect their highways from damage is a local law. Municipal Home Rule Law §10(1)(ii)(a)(6)) provides that local governments have express authority to adopt local laws regarding the acquisition, care, management and use of its highways, roads, streets, avenues and property. Although this statement of authority seems clear on its face, it must be read in conjunction with a host of other laws that may restrict its operation. Nevertheless, this is the provision of law that, when read in connection with the Vehicle and Traffic Law “reasonable regulation” provision, provides the broadest

7 Although each of the regulations in Vehicle and Traffic Law § 1640 (and 1650 and 1660, by extension) are seemingly independent of one another, a recent decision of an intermediate level appellate court has determined that they must be read together. See A.J. Baynes Freight Contractors, Ltd. v. Polanski, 936 N.Y.S.2d. 428 (2011). What that means is that even though only truck routes established by under item 2 above must provide suitable connection to all state highways, the court has extended that condition to all of the regulations adopted pursuant Vehicle and Traffic Law section 1640. That means that any truck route established by local regulation must provide suitable access to all state highways – in other words, trucks cannot be excluded from local roads that provide access to any state highway, even if alternative routes are available.
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foundation for local laws that are commonly referred to as “Road Preservation Laws,” or some variant thereof.

Local laws are a form of municipal legislation that are superior to other forms of municipal legislation (order, ordinance, rule, regulation, resolution, etc…). A validly enacted local law will have the equivalent status as a statute enacted by the state legislature, and enjoys “a presumption of legislative validity,” which means that a local government does not have to “prove” that it has the authority to take a particular action by local law; it will be presumed to have such authority until disproved in a judicial proceeding. This is a very important concept – enacting any of the regulations expressly authorized under the Vehicle and Traffic law by local law (rather than ordinance, rule or regulation) will make them much easier to enforce and defend.

Like all local laws, road preservation local laws must be rationally related to a legitimate public purpose, typically fostering the public health, safety or general welfare. The advantage of adopting a road preservation local law is that it provides the flexibility to the governing board to regulate all traffic that can damage the local roads, and can provide for the enforcement of the regulations that it contains.

**Road Use Agreements**

A third tool available for local governments to protect their roads from damage attributable to a particular project or use is to enter into an agreement with the developer, project sponsor or the user (hereinafter “user”) of the road whereby the user agrees to pay for the damages that are attributable to their use. Road use agreements typically have provisions that would require the user to obtain insurance, post maintenance bonds or other security; require the use of established truck routes and provide for an agreed upon means of ascertaining the damages that the user will be responsible for.

There are several advantages to a properly drawn road use agreement:

- The primary advantage of a road use agreement is that it is essentially a contract that is voluntarily entered into by the user and the municipality. This allows for greater flexibility in the terms and conditions, and because it is voluntary, it avoids the questions about the legal authority that may surface with a road use local law.

- A well-drafted road use agreement also provides for advance, non-discriminatory basis for assessing the damages to the local roads. As the user and the municipality agree to the conditions that will trigger the users obligations, as well as the methodology for calculating the amount of damage, there should be no surprises to the user or the municipality.
A road use agreement provides a clear statement of the rights and obligations of the respective parties to the agreement.

Lastly, road use agreements can be multi-jurisdictional. This can be very useful, as in many cases, the traffic that is sought to be covered by the law will not be limited to the roads of a single jurisdiction, but will often involve travel over roads belonging to multiple municipalities. Significant efficiencies may be achieved if municipalities coordinate their road use standards and enter into a single road use agreement.

These are some of the reasons why road use agreements are the favored mitigation measure for the transportation impacts identified in the rdSGEIS for HVHF.

Which is best?

When it comes to choosing the most effective way of regulating the use of the roads within your municipality, you will quickly find that one size does not fit all, or even most. Local governments are not limited to choosing one of the three options above exclusively, although they certainly may do so. Rather, each local government must decide for itself the best manner of protecting its roads, and the three different options above can be used together to provide a solution to many, if not all, of the problems that the local government can anticipate.

Although road preservation local laws are not typically industry specific, for purposes herein they will be discussed in the context of natural gas drilling. A road preservation local law should be adapted to fit the unique needs of the community it is going to serve – these are not local laws that governing bodies should blindly adopt. Legislative bodies should take the time to understand the provisions they are adopting, and the next chapter is designed to assist them in doing just that. The next part will break down a road preservation local law to give you a better feel for what provisions may be included, and most importantly, why they are included.
3. Drafting and Adopting a Local Law

Proper drafting is essential to ensure that a local law accomplishes what is designed to accomplish. It is also essential to the effective enforcement and defense of the local law.

Investing the time and effort to understand every provision of the local law prior to its adoption can save a considerable amount of human and financial resources down the road. Yet all too often, local laws are circulated and adopted as “models” or “templates” with the original intent and fundamental understanding known only to the initial author. This is not to say that a particular local law cannot suit more than one municipality; in many cases it can and, indeed, makes sense to do so. Nevertheless, the local legislative body should make sure it reads and has a comprehensive understanding of what it is adopting.

To help local legislative bodies understand the provisions of a road use local law and why those provisions were included, we have broken down an actual local law from the Town of Dickinson.8

I. Preliminary Matters: Numbering, Title and Enacting Clause

All local laws must be numbered consecutively in the year in which they were adopted. For instance, the first local law adopted in 2012 should state “Local Law No. 1 of 2012” followed by the name of the municipality and the title of the local law. In addition, every local law must be prefaced with an enacting clause. Looking to our sample local law, you will see that the local law begins as follows:

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Local Law No. 1-2011
Town Of Dickinson, New York
A Local Law Entitled “Town Of Dickinson Road Preservation Law”
Be It Enacted By The Town Board Of The Town Of Dickinson As Follows:
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The parts that follow are considered the body of the local law, are typically broken down into sections.

Title: The title of the local law should briefly refer to the subject of the law. It does not need to be lengthy or creative. A simple, boring title should leave readers with little doubt as to the subject the law is intended to cover.

“This local law may be cited as the “Town of Dickinson Road Preservation Law”

Remember that each local law must deal with only one subject – although there may be some latitude as to what constitutes a single subject. You cannot, for example
adopt a local law that provides for preservation of local roads and abolishes the office of tax collector.

**Authority:** This section of the local law is used to identify the source of local authority to undertake the particular action proposed by the local law. Although not necessarily required, this section is highly recommended as doing so allows for easy verification and/or confirmation that the local government does, in fact, possess the authority to undertake such actions – it will most likely be useful to lawyers and enforcement personnel.

The sources of authority typically fall into one of two categories – those actions that are expressly authorized by statute and those that are an exercise of the local governments “home rule” authority (which is also conferred by statute). Often, local laws will cite both the Municipal Home Rule Law and any other express statutory authority.

*The Town Board of the Town of Dickinson enacts this local law under the authority granted by Section 10 of the New York State Municipal Home Rule Law, New York State Constitution Article IX § 2(c)6.*

*This Local Law is also enacted pursuant to the authority of subdivision 2 of section 23-0303 of the Environmental Conservation Law of the State of New York which provides that.*

*This local law also relies upon Town law section 130.*

*Lastly, this local law is enacted pursuant to Vehicle and Traffic law section 1660.*

Local officials should resist the urge to make legal arguments or otherwise expound upon the statutory authority they reference; doing so will not add any weight to the local law, and will not create authority where there is none. Remember from Chapter 2 that local laws are presumed to be valid, and do not have to be proved in an enforcement proceeding. It is also advisable to always include a reference to Municipal Home Rule Law, as that is the broadest source of authority for local laws, and grants municipalities the maximum flexibility.

**Purpose:** A fundamental principle of U.S. Constitutional law is that all legislation, whether it be federal, state or local, must, in the very least, have a legitimate purpose and be supported by a rational basis. A local law that does not have a legitimate purpose or the purpose is not supported by a rational basis will be considered unconstitutional. This section is typically included to help the lawyers identify the legitimate public purpose and rational basis that they will need to defend the law, if necessary.

*The purpose of this local law is to maintain the safety and general welfare of Town residents by regulating high impact commercial activities that have the potential to adversely impact roads and property. Well-maintained roads are important to the economic well being of the Town. Construction, maintenance, and operation of high impact commercial endeavors (e.g. timber harvesting, mining, natural gas drilling, wind energy facilities and telecommunication facilities) can be economically beneficial.*
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Perhaps more importantly, this section can help to clarify the intent of the legislative body in the event there are questions as to how the local law should be interpreted. Whenever such questions arise, the interpretation should be as close to the intent of the drafters as possible.

It is the intent of this law to insure that the Town’s roads are not damaged or harmed to the overall detriment of the Town by a few individual users who utilize the roads in a manner that causes extraordinary deterioration to the roads.

This Law is not intended to regulate such endeavors, but the intent is to protect the Town roads and property from damage from such endeavors that typically require high frequency use of heavy equipment with heavy loads.

There is considerable latitude and discretion afforded to legislative bodies to determine what a legitimate public purpose is, and thus it is sometimes easier to define by what it is not. Our example includes an express statement that it is not intended to do that which local governments are expressly forbidden from doing:

Nothing contained in this Chapter shall be deemed to limit the right to farm as set forth in Article 25-AA of the New York State Agricultural and Markets Law.

Nothing contained in this Chapter shall be deemed to unlawfully interfere with Interstate Commerce.

II. Definitions

Even the most well-intended and thought out local law will fail to achieve its purpose if it uses terms and phrases that are vague, ambiguous or otherwise unclear. That is why every local law that includes terms and phrases that are unique to the local law or otherwise subject to interpretation, should define such key terms and phrases.

For the most part, the words used in a local law will carry their ordinary dictionary definition, and some local laws expressly state that to be the case. The definitional section is best reserved to define those words, phrases and terms that have a unique meaning or understanding in the context of the local law.

The following terms shall have the following meaning in this Chapter:

Blanket Permit: A Permit that covers more than one vehicle or truck; which would be subject to the permitting process. Vehicles or trucks that are owned, used, rented, leased, hired (including independent contractors) or in any way utilized for a specific project, site or work location shall be considered related vehicles and should be the subject of a blanket permit.

Bond: A commercial bond to ensure that the condition of the town roads and/or property impacted by High Frequency Truck Traffic is left in a good or better condition at the completion of the project as they were at the start of the project.

Local delivery: Delivery or pickup of merchandise or other property along the Town Roads by High Frequency Truck Traffic.
The definition section is also used to incorporate standards into what would otherwise be a subjective, relative or vague term or phrase:

*High Frequency Truck Traffic*: A vehicle or related vehicles that have 3 or more axles and which traverses/travels over 100 miles or more of Town roads or other town property during any 5 consecutive days. When calculating whether a vehicle or related vehicles meets the definition of High Frequency Traffic, 100 miles and 5 consecutive work days shall be used for both individual permits and Blanket Permits.

*Road Preservation Local Law Worksheet (Appendix A)*: Worksheet to be completed by potential Permittee, summarizing the project, project location, start and completion dates, expected maximum gross vehicle weight used for the project, proposed truck routes, and any other items that the Town Board deems necessary.

**III. Permanent Weight Restriction and Truck Route**

**Scope**: Establishing the appropriate scope of the local law is yet another critical component to the effective administration and enforcement of the local law. If the local law applies to too many vehicles or projects (i.e., the local law is overbroad), it could lead to a number of problems. For instance, if a specific truck route is designated, an overbroad local law could cause too many vehicles to use the same roads, creating congestion and having undesirable and unintended impacts on the quality of life for those who use and live along that road. In addition, it could cause those roads to sustain more damage than originally anticipated and make it more difficult to allocate responsibility for damages. An overbroad local law can quickly become an administrative nightmare for local officials charged with overseeing it. The number of permits that need to be issued and processed, as well as the staff and monetary resources necessary to properly enforce it can increase exponentially if the local law applies to too many vehicles.

Conversely, if the scope of the local law is too narrow, it will not be effective in accomplishing what it set out to do. Given the energy and resources that go into creating a regulatory scheme for road preservation, local officials and the residents would prefer a local law that will effectively protect the roads of the municipality.

If the scope of the local law is appropriate, it will create a road use regulatory scheme that is manageable and effective. It will keep the road use permits, truck routes, and road use agreements focused on where they are needed, and will not overwhelm the officials charged with overseeing and enforcing the program, or unduly burden the users of the highway.

To help ensure that the scope of the local law is appropriate, always keep in mind the clear and concise purpose of the local law as discussed above. Consider the following language:

*A. All trucks, tractors commercial vehicles, tractors, tractor-trailer combinations, tractor-semitrailer combinations, tractor trailer-semitrailer combinations, or motor vehicles that are considered High Frequency Truck Traffic are excluded from all Town Roads in the*
Note that the scope of the local law is limited to high frequency truck traffic. By looking to the definitions, we get a clearer statement of the scope, and can determine that this local law would apply to trucks that have 3 axles or more and travel over 100 miles of the jurisdiction’s roads within any 5 consecutive day period. The point to remember here is that there are many ways to draft these local laws, and no one way is correct. Be sure to pay attention to how different provisions of the local law operate together – here, changing the definition of “high frequency truck traffic” will change the scope of the local law.

**Truck Routes:** As noted above, one of the powers to regulate traffic expressly provided by the Vehicle and Traffic Law is the power to establish a system of truck routes. This can be a very useful tool either on its own or incorporated into a broader local law.

Local officials should make sure they establish truck routes carefully. The volume of traffic that is redirected down the roads identified in the truck routes could be significant, and if the routes are not carefully chosen, it could lead to severe congestion, noise and other inconveniences or nuisances for those who ordinarily use those routes or who live along the roads identified as a truck route.

Individual truck routes may be set forth in the local law itself or may be established as part of the permitting process, or both. Either way, local officials should make sure that the roads identified are capable of handling the increased capacity. As more and more heavy vehicles are redirected down these roads, chances are they will wear much more quickly than they were designed for.

This is one area where it is particularly important to make sure the scope of the local law is appropriate. An overbroad local law will capture more vehicles than are necessary, and will exacerbate these problems to frustration of the residents, the transients and the local officials.

Lastly, the system of truck routes must allow for local pick up and delivery, and must provide suitable access to all state highways. Failure to provide an exception for this could render the truck routes invalid.\(^9\)

In our example, the local law establishes a system of truck routes for High Frequency Truck Traffic that is fairly restrictive. It requires that state and county highways be used whenever possible, and that a permit is required for use of all town roads, including local pick up and deliveries.

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\(^9\) See *A.J. Baynes Freight Contractors, Ltd. v. Polanski*, 936 N.Y.S.2d. 428, discussed in note 7, supra
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The designated “Town of Dickinson Truck Route” shall be limited to and consist of routes on, over and along any and all State and County owned/maintained roadways lying within the boundaries of the Town of Dickinson. No High Frequency Truck Traffic shall use Town Highways or roadways, except as hereinafter permitted.

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Local Delivery by High Frequency Truck Traffic is allowed but only after compliance with this Chapter and after obtaining a Permit, a Blanket Permit, or after entering into a road use agreement (as provided for herein).

You may recall that municipalities have a few different ways in which they can limit the amount of truck traffic on particular roads. They may establish a system of truck routes for all trucks over 10,000 pounds, they may temporarily exclude trucks from highways trucks exceeding 4,000 pounds, or they may exclude trucks from all highways specified by the town board or only those trucks that meet specified dimensional requirements. Although the Vehicle and Traffic Law has differing requirements with respect to the signage required for truck routes, it is strongly recommended that appropriate signage be posted for any system of truck routes that is developed by the local government, regardless of which section of the Vehicle and Traffic Law the local government is utilizing.

There shall be signs installed at all major highways entering Town, indicating that High Frequency Truck Traffic must use the truck route system or local delivery by permit.

IV. Road Use Permits

Once truck routes have been established, the local law may provide for a permitting scheme allowing trucks to operate off the designated route. The local law should therefore contain a very simple, clear and express statement that a permit is required for the designated vehicles to travel on the roads that are not part of the truck route. Some local governments have adopted a permitting scheme with multiple permit types available depending on the circumstances surrounding the activity. For instance, in our example above, there are two types of permits that may be issued by the local government – an individual permit and a blanket permit. Alternatively, no permit is required if there is a road use agreement:

Local Delivery by High Frequency Truck Traffic is allowed but only after compliance with this Chapter and after obtaining a Permit, a Blanket Permit, or after entering into a road use agreement (as provided for herein).

Where there are multiple permit options available, the local law should specify when each should be used:

When there is High Frequency Truck Traffic that involves more than one vehicle; including those that are owned, used, rented, leased, hired (including independent contractors) or in any way utilized for a specific project, site or work location; the

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Permittee must apply for a blanket permit or (as permitted elsewhere) a road use agreement. Individual permits will not be allowed in such circumstances.

Lastly, the local law should specify who the appropriate permit holder / applicant is:

The Permittee for a blanket permit or road use agreement shall be an individual or entity that controls or directs the specific project, site or work location and that application must include all vehicles owned, used, rented, leased, hired (including independent contractors) or in any way utilized

Application and Permit Form and Process

Once the requirement for the permit has been established, the local law should set forth the process for applying for and obtaining the permit. Again, there is no one application process that is “right” or even recommended. There are, however, some essential components that should be incorporated into every permitting process.

The first thing a governing board should decide when establishing a permitting process is who will be the officer or body that ultimately issues the permit. Will it be the Town Board? The Highway Superintendent? The Code Enforcement Officer?

C. The Town Board is hereby designated as the authority approve applications for a Permit to operate, transport, or move High Frequency Truck Traffic, as defined above, on, over or across a designated Town Roads or other Town property.

Local legislative bodies should carefully consider who will be responsible for issuing the permits. For instance, if the governing board is the issuing authority, but it only meets once per month and is expecting a lot of permits to be filed, there could be a considerable amount of time that elapses between the filing of the application and the issuance of the permit. The governing board may find itself overburdened by the need to examine the permit applications, establish conditions, along with the other processes involved with issuing a permit. In such a case, this may require the board to hold special meetings to review and decide upon permit applications. A permitting process that will be so burdensome that the town board is just “rubber stamping” the applications without taking the time to consider them should be avoided.

If the governing board will ultimately be the permit issuing body, it may wish to establish a process where the applications are vetted by another officer or officers such as the Supervisor, Highway Superintendent, or perhaps both, who would then make recommendations to the board. The board could then reserve to itself the power to accept, reject or modify the recommendation when it is presented to it.

Conversely, if the permit issuing officer will be an individual officer such as the Highway Superintendent or the Codes Officer, the applications for permits may be considered and decided on a timelier basis. These individual officers, however, do not possess the inherent discretion that may be needed to effectively issue permits, particularly if conditions are to be imposed. In such a case, the local law should
clearly confer this discretion and set forth explicit guidance on how the discretion should be exercised. The law should be very specific and very clear in this regard. It should also be uniform to ensure that all applications will be judged on the same criteria.

No matter who ultimately will be issuing the permits, the local law should clearly articulate the criteria that will be considered when granting a permit or imposing conditions. This will help ensure that all applicants are treated fairly and equally, and minimize the likelihood of arbitrary action on the part of the permit-issuing body or officer.

Not every local law will require the same information, but some general information should be included in every application. By requiring that the application provide proof of the condition of the roads at the time of the application, the governing board will be in much better position to ascertain the damage that was attributable to the permittee. This proof can take many different forms, including photographic or video evidence, engineering reports, etc. For those local governments that are anticipating issuing permits in relation to HVHF, the local law may also request a copy of the baseline study that each applicant for HVHF is required to submit as part of their application to DEC for a drilling permit.

At time of initial application and continuing thereafter, the person requesting the permit shall provide the following:

1) a proposed road map that the High Frequency Truck Traffic will travel on,

2) a video or photographic documentation demonstrating the condition of the proposed road and/or property described in the permit,

3) Copies of valid New York State Vehicle Registrations for each vehicle,

4) Copies of valid New York State Special Hauling Permits, if any, for each vehicle,

5) Proof of Insurance as required herein,

6) Permit fee of $25 per permit and $100 per blanket permit;

7) Any other documents, maps, sketches, and plans, which the Town Board may require and

8) All other requirements of this Chapter; including an escrow account, bond, etc must be satisfied prior to approval of any permit application.

Information shall be provided with the application on each individual vehicle owned, used, rented, leased, hired (including independent contractors) or in any way utilized for a specific project, site or work location.

Once it is determined who will be issuing the permits, the governing board should next consider the application process. The law should charge an officer or body with promulgating an application form, and let applicants know where to pick up the form, where to file form and what information is required to be included:
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The Town Board is hereby authorized to promulgate an application form requesting a Permit and the Permit to be issued upon review and approval of said application.

The Town Clerk is hereby designated as the authority to receive applications for permits to operate or move a vehicle or a combination of vehicles, the weights and frequency of which exceed the limitations provided herein. The Town Clerk must submit a copy of the applications and any approved permit to the Town Code Enforcement Officer and the Highway Superintendent.

Fees and Escrow: Another point to consider are the fees, if any, that are associated with obtaining a permit. When determining what the application fee will be, the local government must remember that administrative fees are not to be used as a general revenue raiser for the local government. Rather, the fees are designed and authorized for the purpose of covering the administrative expenses that the local government will incur when processing the application, and should bear a reasonable relationship to those costs.

The local law may also provide that money be placed in escrow for the use of any professional, consultants, etc… that may be necessary to assist with the review of the application. These types of provisions are quite common in many planning and zoning laws, and serve essentially the same purpose in that context as they will here. The need for professional opinions flows from the technical nature of the information included with or contained in the application. Many local governments will not have the expertise on staff to assist with reviewing the applications or the resources necessary to hire independent experts. That is where the escrow account comes in.

The Board may hire any consultant and/or expert necessary to assist the Town Board in reviewing and evaluating the application.

The Town requires an applicant to deposit with the Town funds sufficient to reimburse the Town for all reasonable costs of consultant and expert evaluation and consultation to the Town Board in connection with the review of any application. The initial deposit shall be the sum of $5,000. However, the Town Board may, in its discretion reduce said fee upon good cause shown. These funds shall accompany the filing of an application and the Town shall maintain a separate escrow account for all such funds.

The law should also specify for what purposes the escrow funds shall be used, how the funds will be accessed and how they will be replenished, as necessary.

If at any time during the review process this escrow account has a balance that shall not reasonably cover the cost of the remaining work of the Town’s consultants/experts, the Town will require applicant to immediately replenish said escrow account in an amount set by the Town, but not to exceed $2,500.

In the interest of fairness, just as the escrow account is required to be replenished, provisions should also be made for its reduction and for reimbursing the applicant any balance remaining upon satisfaction of its intended purpose.
A request may be made by the applicant to reduce or eliminate the funds needed for the consultant/expert escrow. After a recommendation by the Attorney for the Town, Engineer for the Town and/or any other consultant/expert engaged by the Town pursuant to this chapter, the Town Board shall review the request and make a determination based upon the scope and complexity of the project, the completeness of the application and other information as may be needed by the Town Board or its consultant/expert to complete the necessary review and analysis. Additional escrow funds, as required and requested by the Town, shall be paid by the applicant. The initial amount of the escrow deposit may be established by the Town Board upon receipt of information sufficient to make such a determination.

In the event that there is any balance remaining in the escrow account as of the date that the Town Board determines that the Permit has expired and further determines that no damages or injuries have been caused to any Town Road or Other Town Property (and that no discharges or spills have occurred on any Town Road or Other Town Property) for which the Town has not been fully reimbursed, the Town shall pay to the Permittee the balance remaining in the escrow account.

Local officials should give careful consideration to the allowable uses of the escrow funds, for the funds will only be permitted to be expended for those purposes. If the purpose is too vague, it could be invalid. For instance, the law should not simply state that the funds may be expended for “any lawful purpose” or things of that nature. Rather, the local law should articulate the appropriate uses of escrow monies.

As used in this section, the term “costs and expenses” shall be deemed to include the reasonable fees charged by engineers, consultants and/or experts hired; reasonable administrative costs and expenses incurred by the Town in connection with the permitting process and the repair, restoration and preservation of Town Roads and Other Town Property; and reasonable legal fees, accountants fees, engineers fees, costs, expenses, disbursements, expert witness fees and other sums expended by the Town in pursuing any rights, remedies or claims to which the Town may be entitled under this Local Law or under applicable provisions of law, as against any Permittee, any person who has violated this Local Law, any insurance company, any bonding company, any issuer of a letter of credit, and/or any United States or State of New York agency, board, department, bureau, commission or official.

The Town is hereby authorized to withdraw funds from said escrow account (without prior notice to the Permittee) in order to promptly reimburse the Town for any costs and expenses (as defined herein). The Town must provide a monthly update as to monies expended from the escrow account.

V. Permit Conditions

The local law may also provide for conditions to be attached to a permit. Some of the conditions of the permit may be required of all applicants, while the issuing authority may be conferred with some discretion to impose conditions upon permits on a case by case basis as the circumstances warrant.
Conditions required of all applicants should be expressly set forth in the law as part of the application process, along with an acknowledgement from the applicant that they are aware of and will abide by all of the conditions and continuing obligations required of a permittee. In our example, some special conditions imposed on permittees are:

The permit shall not be assigned or transferred without the written consent of the Town Board.

The Town Clerk shall be given three business days written notice by said Permittee of the date when it intends to begin the activity authorized by the permit, and prompt notice of its completion.

The permit shall remain valid only for so long as the Permittee continues to hold a valid New York State Hauling Permit or Divisible Load Permit; where necessary.

The permit shall not authorize the holder to exceed the maximum gross weight limit authorized for crossing an R-Posted bridge or culvert.

Valid insurance, maintenance bonds and letters of credit shall be maintained as required by herein.

Traffic will be maintained in accordance with the Uniform Traffic Control Manual.

If any of these conditions are not met, the permit is automatically voided and all work shall cease.

In addition to all of the conditions that the issuing authority requires at the time of the application, the local law may provide for continuing obligations once a permit has been issued:

Additionaly, after issuance of the Permit, the Applicant must provide updated information including by not limited to changes in: truck routes, project, site or work location, etc. If in the opinion of the Town Board, the changes are significant, then the Permittee must file a new Permit application; including new relevant fees, bonds, escrows, insurances, etc.

Every permit or blank permit shall be carried on the vehicle to which it refers and shall be open to inspection of any authorized enforcement officer, peace officer or police agencies of Broome County or other officials authorized by the Town Board.

After issuance of the Permit, the Permittee will arrange for video or photographic documentation of condition of the roads, shoulders, and all structures (culverts, bridges, etc.) that will be traversed by the permitted traffic on monthly basis and within two weeks after the conclusion of the permitted work. All video or photographic documentation will be submitted to the Town Board within one week of recording. Failure to submit the required video or photographic documentation will result in immediate revocation of the Work Permit.

If the issuing officer or body will be conferred the authority to impose additional conditions that are not set forth in the text of the local law itself, those conditions should be related to the permit and to the special circumstances that warrant the imposition of such conditions. If not, the conditions may be deemed arbitrary and unenforceable. The findings by the permit-issuing officer or body that support the
imposition of a condition should be clearly identified and documented at the time the permit is issued.

**VI. Public Hearings**

While a public hearing is not a required step in the application process, and the local law in our example does not provide a public hearing on the permit, it may be beneficial nonetheless. A road use local law may not itself be particularly controversial, but the establishment of the individual truck routes for a particular project very well may be – residents are typically passionate when it comes to traffic that will impact their commutes, pass by their homes or otherwise impact their daily lives. Therefore, governing boards may decide that it is beneficial to have a public hearing on the permit so that the concerns of the residents may be addressed.

A public hearing may also be helpful to the applicant, as it will provide the applicant with an opportunity to appear before the permit issuing authority and answer any questions that may arise from the permit application.

If a public hearing is required when establishing truck routes pursuant to their local law, the following points should be considered:

1. A hearing should not be scheduled at an obviously inconvenient hour. If most people in the community work days, then the best time for such hearing may be in the evening, not in the morning or afternoon.

2. A study or report may be prepared by someone with knowledge of the local roads and traffic patterns, and be presented at the hearing.

3. When the hearing opens it is a good idea to explain in layman's language what the proposal before the hearing is all about; and what the consequences will be if it is approved or not. After that, it is good practice to explain the ground rules of the hearing.

4. Those holding the hearing should not get caught in the trap of a request for a show of hands, or vote, of those residents present on the matter. Such a vote is meaningless. It should be explained that the decision rests with the appropriate local officials, with the help and advice of the residents.

5. The presiding officer should emphasize that anyone choosing to speak should address his or her remarks to those holding the hearing. Any debate between those "for" and those "against" the proposal should be avoided. If there is a big crowd present, a reasonable time limitation for speaking should be imposed.

6. Those holding the hearing are there to listen, not to express their own views or opinions – they should not debate with the audience during the hearing.
(7) If it is a particularly complex or controversial hearing, consider allowing written comments to be submitted for a defined period beyond the close of the public hearing. This will allow those who were unable to attend to have their comments considered.

If the road use local law requires a public hearing, it should provide the notice requirements for the public hearing. Notice of the public hearing should be published and posted in the same manner as other public hearings (official paper, clerk’s signboard, municipal website, etc…) a specified number of days in advance of the public hearing – typically either 5 or 10 days. The notice should contain a brief description of the purpose of the hearing so that a reader can make an informed decision as to whether or not they need to attend. Specific notice of the hearing should be provided to the applicant, and perhaps to those along the affected roads.

VII. Damages to Town Roads

The provisions of the local law that establish truck routes and weight limits are designed to prevent damage to local roads – remember, prevention and preservation is the primary goal of the local law. Nevertheless, not all damage will be preventable. It is therefore important for the local law to set forth the responsibility of the permittees with respect to damages that are attributable to uses covered by the local law, and to provide for security to help cover the costs of the damages.

From a legal standpoint, the Highway Law has long held those responsible for injuring the highways liable for the damage that they have caused. Highway law § 320 provides that:

Whoever shall injure any highway or bridge maintained at the public expense, . . .or by drawing or propelling over the same a load . . . of such weight that will destroy, break or injure the surface of any improved state highway, county road or town highway, or by any other act, or shall injure, deface or destroy any mile-stone or guide-post erected on any highway, shall for every such offense forfeit treble damages.

This provision of the Highway Law requires that whoever damages a publicly maintained highway by hauling loads of such a weight that will damage the surface will be responsible for paying three-times the amount of the damage (treble damages). In one of the few cases applying this statute, the court has explained it purpose.

The main purpose of the statute was to protect the highway for its ordinary use, and to save the expense of frequent reconstruction. Penalties are visited upon those who lightly regard the rights of others. We think the rule of liability is to be applied whether the injury is the result of a single act or of several continuous, related offenses against the statute. Town of Waterford v. L.B. Brookeit Lumber Co. 227 A.D. 422, 237 N.Y.S. 436 (3rd Dept. 1929)

Accordingly, state law holds those who damage the roads responsible whether it be the result of a single, heavy load or frequent, lighter loads. By this point, the
question what constitutes the “ordinary use of the highway” that is protected should be addressed in the preliminary stages of the application process. By requiring photographic and/or video proof of the condition of the road, coupled with engineering reports and traffic studies, a local government should be able to establish what the ordinary use of the road is. Permittees that cause damage to the roads by hauling loads, other than those considered part of the ordinary use of the road, are responsible for the damages that they cause.

Damage provisions of the local law, therefore, should be carefully drawn to limit the permittee’s responsibility to those damages beyond what would otherwise be considered in the ordinary use of the road. Consider the following language:

\[
\text{With the exception of normal wear and tear, the Permittee is responsible for all damages, injuries, discharges or spills that occur on or to the Town Roads, other Town property, ditches, curbs, sidewalks or other improvements and to public utilities of the Town in the roadway.}
\]

The example that we have been using limits damages to those except the “normal wear and tear.” Note also that the local law applies not only to damages to the roads, but also to the necessary appurtenances thereto, such as curbs, ditches and sidewalks.

Once damage to the local roads has been established, the local law should provide how that damage will be repaired. Once again, there are different options the governing board may consider here. One option would be to have the damages repaired by the town or its contractor. Another would be to have the permittee repair the damages that it caused. In our example, the town has decided not to settle this matter definitively, but rather to grant itself the ability to determine this at the appropriate time:

\[
\text{Upon due notice being given to the Permittee and at the Town's option, the Town may allow the Permittee to repair all damages or the Town may arrange the necessary repairs and charge the Permittee for all labor and materials at the prevailing rates. The highway shall be restored and the integrity of the repair maintained for a period of one year from the date of any repairs. Particular attention is called to the necessity of thoroughly compacting the back fill, which will be required by the Town. If the Town requests the Permittee to repair the damages, such repair will done to the specifications, time line and any and all other requirements of the Town.}
\]

A few points should be made about what is contained in the language specified above. First, note that the town has options. It may allow the permittee to repair the road, at the towns option, or it may decide to perform the work itself and charge it back to the permittee. Also note the use of the phrase “prevailing rates.” Should the town decide to perform the work itself or through a contractor, it will be subject to all of the statutory requirements that accompany a public works project. Mandates such as competitive bidding and prevailing wage laws may increase the cost of the project, and the local law should make it clear that the permittee would be responsible for paying these costs.
Secondly, it is important that the local government retain complete control over the standards and specifications to which the restored road will be built. This helps not only to ensure that the road meets the such minimum standards, but also helps protect against any super-adequacy – roads that are built to specifications that exceed what is necessary or desired by the town officials. Just imagine having to maintain a stretch of multilane paved highway when an oil and stone user road was more than sufficient to accommodate the ordinary use of the road.

The local law should also require that the permittee post an adequate security for the local government to draw upon in the event that it has to undertake the repairs itself, either at its option or upon the default of the permittee. The form and amount of security may vary from locality to locality. Just like application fees, the security required is not a revenue raiser and should be set in an amount that is sufficient to cover the anticipated costs of repairing the damage that is anticipated. If the required security is grossly excessive to what could reasonably be anticipated, the provision could be invalidated as arbitrary. One way to avoid this is to set a reasonable amount and to require replenishment of any amounts that are expended.

One thing to keep in mind when setting the amount of security, or estimating the cost of repairing the road is that the local government should base the amount on the total cost of repairing the road, not just its local share. Federal or state aid (i.e. CHIPS funding) that the local government may regularly rely upon to offset its costs of capital improvements may not be available for these repairs.

Similarly, the local law should require that the permittee indemnify and hold harmless the municipality against the liabilities that arise out of the actions of the permittee in relation to the project, and that the permittee maintain an appropriate amount of insurance against such liabilities throughout the project.

The Permittee shall present to the Town a maintenance bond in the amount of $250,000.00 and a bank letter of credit in the amount of $10,000.00 in favor of the Town guaranteeing compliance with the provisions of the permit. At such time, if ever, that said letter of credit and/or maintenance bond is expended, the Permittee shall replace the same within five (5) days written notice from the Town, failing which the permit shall be subject to revocation.

Such Maintenance Bond shall be maintained for at least a period of one year after repairs have been approved by the Town. The highway shall be restored and the integrity of the repair maintained for a period of one year from the date of any repairs.

One thing to keep in mind when setting the amount of security, or estimating the cost of repairing the road is that the local government should base the amount on the total cost of repairing the road, not just its local share. Federal or state aid (i.e. CHIPS funding) that the local government may regularly rely upon to offset its costs of capital improvements may not be available for these repairs.

Similarly, the local law should require that the permittee indemnify and hold harmless the municipality against the liabilities that arise out of the actions of the permittee in relation to the project, and that the permittee maintain an appropriate amount of insurance against such liabilities throughout the project.

The Permittee shall present to the Town certificates of insurance evidencing the acquisition of liability insurance coverage naming the Town as an additional insured on a non-
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contributory basis with the minimum limits of coverage for bodily injury equal to $1,000,000.00 for each person injured, $2,000,000.00 for aggregate bodily injury resulting from each occurrence, and $500,000.00 property damage.

Said insurance shall be maintained throughout the term of the permit, at the cost and expense of the Permittee, and the aforementioned certificates shall provide for thirty (30) days’ notice to the Town prior to cancellation of coverage.

VIII. Waivers, Exceptions and Alternatives

In order to avoid creating an unnecessary hardship on a permittee, and to help avoid the potential problems caused by an overbroad local law, it is important that a relief mechanism be provided in the law. Akin to a variance in a land-use or moratoria law, the local law may provide a procedure where applicants can apply for a waiver from the strict requirements of the law. In order to keep with the overall purpose of the law, however, such waivers should not be given freely – the law should provide the grounds upon which waivers shall be granted and the process that must be followed for a permittee to obtain a waiver. These provisions are essential to make sure that all applicants are treated fairly when applying for a waiver and that their requests are treated on the merits.

All requests for a waiver from the standards set forth in this Local Law shall be made to the Town of Dickinson Town Board in writing and shall contain the grounds on which the appellant relies for requesting the waiver, including all allegations on any facts on which the appellant will rely. Where the Town Board finds that due to special circumstances of the particular case a waiver of certain requirements is justified, then a waiver may be granted. No waiver shall be granted, however, unless the Town Board finds and records in its minutes that: (a) granting the waiver would be keeping the intent and spirit of this Local Law and is in the best interests of the community, (b) there are special circumstances involved in the particular case; (c) denying the waiver would result in undue hardship to the applicant, provided that such hardship has not been self-imposed; (d) the waiver is the minimum necessary to accomplish the purpose.

Apart from waivers, the local law may also provide for exceptions. Vehicles that are specifically excepted from the permitting scheme established by the law do not need apply for a permit at all. These are typically vehicles that have been pre-determined by the governing body to be exempt from the scope of the permit requirements of the local law. For example, vehicles that provide an essential service to the community or are otherwise necessary to the health, safety and welfare of the community would not need to obtain a permit to use local roads. It would not serve the community well at all to require a fire department to obtain a blanket permit for its trucks to respond to emergencies! In our example, municipal and utility service vehicles are exempted from the scope of the law:

E. Due to the vital nature of the following vehicles in providing public services deemed necessary in preventing emergencies or in safeguarding the public health, safety and welfare, and since overweight vehicles may be required to perform these services, the following vehicles are granted exemptions from the permitting process of this local law:
(1) Maintenance, repair and service vehicles owned and operated by municipalities or fire companies on official municipal or fire fighting business.

(2) Maintenance, repair and service vehicles owned and operated by a utility company or authority and on official utility business.

A very important distinction must be made between waivers and exceptions. Waivers are required of applicants who are subject to the local law, and are only to be granted upon request of the applicant after making the necessary showings of special circumstances. Exceptions, however, are not subject to the local law in the first instance. A vehicle that is exempt is entitled to use the local roads without having to make any special showings or applications.

Road Use Agreements – An alternative to a permit

Our example offers an alternative to the permitting requirements in the form of a road use agreement. If the applicant has entered into a road use agreement with the town, no permit is required. Road use agreements offer several advantages, as discussed in Chapter 2, above. Perhaps most importantly, road use agreements have a proven track record with respect to wind energy development, and in the particular context of HVHF, they appear to be the favored means to mitigate the anticipated impacts on local roads under the rdSGEIS.

A road use agreement may be a freely negotiated agreement, or may be based on a form or template developed by the local government. Either way, the concerns sought to be addressed by the road use agreement should be in alignment with the those of the local law. In many cases, the requirements of the local law can be used as a guide to developing a road use agreement.

A Permitee, whom has more than one vehicle, which qualifies as High Frequency Truck Traffic, may request that the Town enter into a town-wide road maintenance agreement in lieu of separate permits for each vehicle(s) or even a blanket permit. Said road maintenance agreement shall conform to the minimum requirements of this local law, would be executed by the Town and the Permitee and shall include such additional terms as are reasonably required by the Town, including but not limited to insurance, maintenance bond, truck traffic routes, traffic schedules, inspections and road surveys. All of the vehicles specifically listed in such agreement, including those owned by the holder, its agents and sub contractors, shall be deemed to be covered by such agreement, and upon execution of the agreement the Commissioner shall issue a blanket permit.

IX. Enforcement Authority

The local law should include express provisions relating to its enforcement. Without effective enforcement mechanisms provided by law, the local law will prove to be very difficult to administer and enforce.

Believe it or not, effective enforcement will begin before any permit is issued and even before the first application for a permit is filed. How is that? The first step to effective enforcement of the local law is to make sure that all potential applicants are
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put on notice and aware of the truck routes and the permitting requirements. This can be accomplished by posting the roads and by giving specific notice to the sponsors of projects within the local government when they apply for other permits or when the town receives notice that the particular project is proposed. In the context of HVHF, for example, the local government will be notified by the Department of Environmental Conservation upon the filing of every application for a natural gas drilling permit within its territory. In such cases, upon receiving notice of the application, the local government can contact the project sponsor and inform them of the local road use requirements.

Although effective enforcement begins with notice, it is important to make it clear in the local law that the failure to receive notice shall not relieve any potential applicant or permittee of their responsibilities under the law.

The local law should specify which local officers are responsible for the enforcement of the code, and expressly confer the authority to enforce the codes to those officers. Consider the following language:

*This chapter shall be administered and jointly enforced by the Town enforcement officers and the police agencies of Broome County and NYS or officials authorized by the Town Board of the Town of Dickinson. Violations may be reported by verbal or written complaint by at least one person, including the enforcement officer.*

*Town enforcement officers and the police agencies of Broome County and NYS and any other officials authorized by the Town Board of the Town of Dickinson are authorized to enforce any violation of the Chapter.*

Once a permit is issued, the local law should take appropriate measures to make sure that the terms and conditions of the permit are adhered to. This was discussed above in the section on continuing obligations and conditions. Beyond those measures, enforcement will generally fall into one of two categories: administrative enforcement measures and penalties for violations of the local law. Administrative enforcement measures are those measures that can be initiated and enforced solely by the officials charged with administering and enforcing the local law. Two common measures include the issuance of stop work orders and the suspension or revocations of permits.

**Stop Work Orders:** A stop work order is an administrative order to discontinue an illegal act pursuant to the local law. This can be an effective tool when the road preservation law is being violated because a permit was not sought or the terms and conditions of the permit are not being adhered to. A stop work order should be in writing, specify the nature of the violation, the section of the code, and conditions upon which work or use can resume.

*The Highway Superintendent and the Building and Code Inspector shall each have the right and authority to issue stop work orders to those operating in violation of the terms of*
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this permit, or contrary to the permittee’s application or conditions upon which its permit was issued or in violation of this Local Law, in violation of applicable provisions of law.

Suspension or Revocation of Permit: The suspension or revocation of a permit is exactly what it sounds like – the permit that was initially granted to the permittee is either suspended temporarily or permanently revoked, and no work can continue until either the suspension is lifted or, in the case of revocation, a new permit is obtained. The permittee should be afforded due process before a permit is revoked. Due process will generally entail providing the permittee with notice of the proposed revocation and an opportunity to be heard on why the permit should not be revoked. The opportunity to be heard will typically occur at a hearing held on notice to the permittee.

Upon the violation of any provisions of this permit, or violation of any provisions of this Local Law, or violation of applicable provisions of law, or violation of any conditions, the Town Board may suspend any such permit issued hereunder for no more than thirty (30) days, and following a public hearing at which the Permittee shall have the right to appear and be heard, the Town Board may permanently revoke any permit on written notice to the Permittee.

Penalties for Violations of the Local Law: Aside from the administrative remedies discussed above, the local law may also provide for civil or criminal remedies for violating the provisions of the local law. Civil or criminal remedies will only be imposed after a proceeding has been brought seeking to enforce the local law, which means that they cannot be directly or immediately imposed by an administrative official. Where the local government is seeking to have violations enforced in this manner, the burden is on such local government to bring the appropriate action.

Criminal penalties make violations of the local law a crime. As such, a criminal proceeding may be commenced by the issuance of an appearance ticket or the filing of information by either the District Attorney or an officer who has been deputized as his or her deputy. Criminal penalties could involve the imposition of fines as well as imprisonment.

Any person who violates any provision of this chapter shall be deemed guilty of a Misdemeanor and, upon conviction thereof, shall be subject to penalties in a fine of not less than $1,000 and imprisonment up to one year.

Civil penalties will not involve fines, imprisonment or the District Attorney. Rather, civil penalties will be recoverable by the local government by bringing an action before the court, most likely for either injunctive or monetary relief. In essence, when recovering civil penalties, the local government is suing the permittee or applicant for a violation of the local law, and requesting the court to award such local government the relief that it is seeking. As noted above, the most common form of relief for local governments in this context will be injunctive relief – an order from
the court directing that the permittee cease the illegal behavior, or otherwise compelling compliance with the local law.

An action or proceeding may be instituted in the name of the Town, in a court of competent jurisdiction, to prevent, restrain, enjoin, correct, or abate any violation of, or to enforce any provision of this chapter. In particular, but not by way of limitation, where there is an violation of this chapter, an action or proceeding may be commenced in the name of the Town, in the Supreme Court or in any other court having the requisite jurisdiction, to obtain an order directing abatement of the condition in violation of such provisions. The Town may seek restitution for costs incurred by the Town in remedying each violation, including but not limited to reasonable attorney’s fees.

Civil penalties are monetary damages, meaning that the local government would have to establish its damages in order to recover the civil penalties authorized by the local law.

Civil Penalties In addition to those penalties prescribed herein, any person who violates any provision of this chapter shall be liable for a civil penalty in an amount not to exceed $5,000.00 for each day or part therefore during which such violation continues. The civil penalties provide by this subsection shall be recoverable in an action instituted in the name of the Town.

The distinction between civil and criminal remedies goes far beyond what is discussed here, and is worthy of its own treatise. Nevertheless, if the remedy is not provided for and authorized in the local law, it may not be available to the town. There is much to consider prior to choosing how to best enforce the local law in any particular case. It is therefore beneficial to include language that would allow the local government to pursue both civil and criminal remedies, as well as remedies otherwise provided by law. This way the local government does not have to elect one to the exclusion of all other remedies. The following language is intended to allow the local government to keep its enforcement options open and preserve its right to pursue multiple remedies:

Remedies not exclusive. No remedy or penalty specified in this section shall be the exclusive remedy or penalty available to address any violation described in this chapter. Any remedy or penalty specified in this section may be pursued at any time, whether prior to, simultaneously with, or after the pursuit of any other remedy or penalty specified in this section.

X. Miscellaneous Provisions

Road preservation local laws, like all local laws, should have a few key clauses that are designed to protect the local government from any unintended consequences of the law and to help guide the interpretation. Some of these key clauses are listed and explained below.

Reservation of rights: The purpose of a reservation of rights provisions is to make sure the local law does not incidentally restrict or eliminate any other rights that the local government may have pursuant to any another law or state statute.
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The Town hereby retains and reserves all rights it has now or may have hereafter, pursuant to the provisions of . . .

The Town hereby retains and reserves all other rights it has now or may hereafter, to seek reimbursement or compensation for costs related to repairing damages to any Town Road or Other Town Property.

State Environmental Quality Review Act (SEQRA): The issuance of a permit or road use agreement that may impact the environment will be considered an action pursuant to SEQRA, and subject to review. Including this section in the local law puts the applicant on notice that the issuance of the permit may be subject to environmental review under SEQRA.

When applicable, the Town shall at all times comply with applicable provisions of the Environmental Conservation Law of the State of New York and applicable provisions of the state environmental quality review regulations (6 NYCRR Part 617) (hereinafter “SEQRA”).

Severability: The severability clause should be a standard part of every local law. It serves to protect the remainder of a local law should one part or clause be determined to be unlawful.

If any part or provision of this Local Law or the application thereof to any person or circumstance be adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to the part or provision or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder of this Local Law or the application thereof to other persons or circumstances, and the Town Board of the Town of Dickinson hereby declares that it would have passed this Local Law or the remainder thereof had such invalid application or invalid provision been apparent.

Repealer: This provision makes it clear that this local law is intended to trump all other local laws that may be inconsistent with its provisions. Including this expressly in the local law could be helpful when trying to reconcile local laws with inconsistent provisions.

All ordinances, local laws and parts thereof inconsistent with this Local Law are hereby repealed.

Effective Date: Lastly, the local law should specify when it is effective. The local law can be made effective upon its filing with the New York State Department of State, or at some date thereafter.

This Local Law shall take effect immediately upon filing in the office of the New York State Secretary of State in accordance with Section 27 of the Municipal Home Rule Law.

XI. Procedure for adopting a local law

Once the local law is drafted, all that is left is its adoption and filing. The procedure to adopt a local law is set forth in the Municipal Home Rule Law, and should be followed, step by step, to avoid any deviation from the prescribed statutory
provisions. The following checklist of steps should help guide you through the adoption process:

(1) A proposed local law is introduced by a member of the legislative body at a public meeting, or as otherwise provided by its rules of procedure.

(2) A public hearing must be held before the town board on public notice. Typically, five days must elapse from the time the notice first appears in the paper and the date of the hearing.

(3) A proposed local law must be in final form on the desks of the local legislative members for seven calendar days, exclusive of Sundays, or be mailed to each member at least ten days prior to passage, unless the chief executive officer certifies as to the necessity for its immediate passage. A local law passed immediately upon certificate of necessity requires a two-thirds approving vote by the legislative body. Otherwise, only a majority vote is necessary.

(4) The vote upon the local law is by “ayes” and “noes.” Names of members present and their votes must be entered in the town board minutes.

(5) The local law must be certified by the clerk, who must file a certified copy with the Secretary of State within 20 days after a local law has finally been adopted.

Once the local law has been filed with the Secretary of State, it will be effective on the 20th day after its final adoption, unless a different time is specified therein.
4. Conclusion

Municipal roads and bridges are not protected by insurance in the same way a Town hall, City park pavilion, County parking garage or a Village police station might be covered. Wear and tear to road surfaces caused by overweight vehicles and equipment are not insurable events. Instead, they are a direct cost to the municipality. Insurers, like NYMIR, are concerned if roads deteriorate, however, since we do insure against property and personal injury events that occur on rights of way owned, managed or maintained by our municipal members. Thus we have a shared interest in seeing that as much as possible, those rights-of-way are protected from unusual or extraordinary loads which they are simply not designed or capable of carrying.

NYMIR and its Subscribers have a vested interest in preserving existing rights-of-way. The frequency and severity of accidents on local roads --where a victim might allege that the cause of the accident, or one of the contributing factors, was the condition of the road --does drive up the cost of insurance. While New York’s local governments enjoy strong protections such as the prior notice of defect requirements, plaintiffs’ often allege that the defect was caused by improper design, or even that the municipality had actual knowledge of the defect so as to circumvent the prior notice requirement. While we may ultimately prevail even where that allegation is made, the costs of defense are often considerable. Therefore, it is incumbent on all NYMIR Subscribers to consider the potential exposure that exists on the extensive road system which you are responsible for. To the extent possible, protect that infrastructure from foreseeable damage which results from exposing those assets to excessive loads they simply cannot bear.