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Siting Large/Utility Scale Solar Projects:
Important Environmental, Zoning, and Legal Aspects to Consider

April 22, 2020
About B&L / Office Locations

- Founded in 1961
- ~300 Employees
- 12 offices in New York, Pennsylvania, and Maryland
- ENR Top 500 Design Firm for the past 8 years
- Selected by Zweig Group as a “Best Place to Work For” 2 years running
Practice Areas

- Water
- Wastewater
- Environmental
- Transportation
- Sustainable Planning and Design
- Landscape Architecture
- Solid Waste
- Facilities
- Asset Management
• What Constitutes a Utility Scale Solar Project?
  ➢ Amount of Acreage to be Impacted
  ➢ Electrical Generating Capacity of the Solar Facility

• SEQRA Review Process
  ➢ Preparation of the Environmental Assessment Form (EAF)
  ➢ Coordinated Review by Involved Agencies/Interested Parties
  ➢ Need for Supplemental Studies (Visual Impacts, Glare Analysis)
  ➢ Impacts to Prime Farmland/Agricultural Soils

• Zoning Considerations
  ➢ Is a Special Use Permit Required?
  ➢ Zoning Board of Appeals Waiver Variance Request
• Legal Considerations
  ➢ Adoption of a Solar Law or Solar Moratorium
  ➢ Decommissioning Bonds and Security
  ➢ Land Owner Authorizations
  ➢ Impacts to Neighboring Properties
  ➢ Payment in Lieu of Taxes (PILOT) Agreement with Host Municipality
New York State is currently facing unique challenges with the Covid-19 pandemic.

Municipal Boards may continue to move forward with the review of applications, even in the face of the challenges of working remotely.

State Government Response Relative to Open Meetings Law:
- Executive Order 202.1 - Suspension of certain portions of Open Meetings Law
  - All public bodies can now hold meetings by teleconference or video conferencing if they wish, so long as their meeting is recorded and eventually transcribed.

Currently Unclear – Effect of the Executive Orders on Public Hearings (Ability of Public to Participate)
- Key is to provide some method of actual participation by the public – interactive audio, video, real-time comment or chat features that can be read into the record, letters, email or other messages up to the time of the vote or some set time (which would be placed in your public hearing notice).
Covid-19’s Effect on Applications

• Applications prepared and/or received by the municipal boards should be drafted considering the possibility of being remotely reviewed

• May need to include novel ways to present the application; i.e. video, audio, interactive presentations

• Boards should consider uploading all application materials, minutes, notices on their website

• A developing process for both the applicants and municipal boards
The definition of a utility scale solar system can vary from one municipality to the next based on the provisions of the applicable zoning code.

The Town of Canajoharie (Montgomery Co.) defines a Utility-Scale Solar Collector System as follows:

“A solar energy system that is designed and/or built to provide energy as an ongoing commercial enterprise, or for commercial profit, or designed to distribute energy generated to a transmission system for distribution to customers rather than for use on the site. A utility-scale solar use may include solar energy system equipment and uses, such as but not limited to”:

- Supporting Posts and Frames;
- Buildings and/or other Structures;
- Access Drives;
- Inverter Equipment, Wires, Cables; and
- Other equipment for the purpose of supplying electrical energy produced from solar technologies, whether such use is a principal use, or in part a principal use or an accessory use or structure.
Important Fact: Solar Energy Systems that produce 25 MW or more were permitted by the Board of Electric Generation Siting and the Environment (Siting Board) under the (former) Article 10 of the NYS Public Service Law.
Passed in the 2020 State Budget

“Accelerated Renewable Energy Growth and Community Benefit Act”

- Establishes the Office of Renewable Energy Siting ("ORES"), within the Department of State, which will provide a more consolidated state environmental review process for utility scale energy projects
- Applicants with projects of 20 MW to 25 MW may choose to opt into the new siting process
- Those projects currently in the Article 10 pipeline (25MW or greater) will automatically fall under the new streamlined process
• All projects with nameplate capacity between 20 and 25 MW may opt-in

• ORES will promulgate rules for siting and permitting within one year (until then, Article 10 controls)

• It is expected to be a streamlined process (free of the delays found under Article 10)

• In order to set uniform permitting standards and conditions, ORES will consult with:
  • NYSERDA
  • Department of Environmental Consultation (“DEC”)  
  • Department of Public Service (“DPS”)  
  • Department of Agriculture & Markets  
  • Other relevant state agencies and authorities with subject matter expertise

• ORES will hold 4 public hearings in the state to receive comments from public and towns prior to adoption of standards
**Procedure & Timeline**

- Primary Change: no need to file Article 10’s Public Improvement Plan and Preliminary Scoping Statement, which effectively shortens the pre-application permitting timeline by 240 days

<table>
<thead>
<tr>
<th>Project applications will require a completeness determination within 60 days (but applicants can consent to an extension)</th>
<th>ORES must publish a draft permitting conditions for public comment within 60 days after the application is deemed complete</th>
<th>Municipalities and members of the public have 60 days to respond to the published draft</th>
<th>Municipalities who receive notice of an application “shall” submit a statement to ORES indicating whether the project complies with local law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proof must be submitted that ORES consulted with local municipalities about procedural and substantive requirements of applicable local law</td>
<td>If public comments, including comments from a municipality, raise a “substantive and significant issue,” then ORES must proceed to an adjudicatory hearing to hear arguments and consider evidence.</td>
<td>If the project does not comply and ORES decides not to hold an adjudicatory hearing, the Department of State must hold public statement hearing in the municipality</td>
<td>If ORES fails to meet this deadline, a permit will automatically issue and uniform conditions or site-specific permit conditions will be enforceable (as long as they were issued for public comment)</td>
</tr>
</tbody>
</table>

All final permits will require permittee to provide host community benefit, which can be agreed upon between the two parties (or ORES or the Public Service Commission)

- Intended to provide benefits to owners of land and communities where renewable facilities are located
- May include such benefits as utility bill discounts
• **Within 90 days after ORES issues a final decision**, a party challenging the grant of permit may file a petition in the Appellate Division where the project is proposed to be located.

• The Scope of the Appellate Division’s Review will be limited to whether ORES’ decision is:
  - in conformity with the Constitution, laws and regulations of the State and United States;
  - supported by substantial evidence in record and matters of judicial notice properly considered and applied in the opinion;
  - within ORES’ statutory jurisdiction or authority;
  - made in accordance with procedures set forth in this section or established by rule or regulation pursuant to this section;
  - arbitrary, capricious or an abuse of discretion; or
  - made pursuant to process that afforded meaningful involvement of citizens affected by the facility regardless of age, race, color, national origin and income.

• Anything not addressed by these new rules will be subject to Article 78 requirements for appeals of agency decisions.
• Applicants must pay $1,000 per MW in fees into a NYSERDA-administered local agency account for participation of municipalities and community intervenors in public comment periods or hearing procedures.

• ORES will disburse these funds pursuant to guidelines to be established, but includes disbursement for municipalities to determine local law compliance.

• Article 10 and Article 7 intervenor funds already paid will be credited to NYSERDA-administered local agency account.

• To maintain funding, ORES may establish regulations to collect additional fees to recover application-related costs.
• The “Unreasonably Burdensome” Standard:
  • ORES may issue a permit only if it is determined the project would comply with applicable laws and regulations BUT ORES may elect not to apply, in whole or in part, any local laws or ordinances which would apply, if it finds that, as applied to the proposed facility, it is **unreasonably burdensome** in view of the Climate Leadership and Community Protection Act (“CLCPA”) targets and environmental benefits of the proposed facility.

• This differs from Article 10’s “unreasonably burdensome” standard, which is judged “in view of the existing technology or the needs of or costs to ratepayers whether located inside or outside of such municipality”

• This gives ORES significantly more flexibility to choose not to apply local law

• This changes the applicable standard to one that expressly promotes consideration of progress toward CLCPA’s goals and specific environmental benefits of projects over local values.
Proposed Legislation

• Clean Energy Resources Development and Incentives Program

  • Intended to rapidly advance “Build-Ready” projects and prioritize the development of existing or abandoned commercial sites, brownfields, landfills, former industrial sites, and abandoned or underutilized sites
  
  • NYSERDA, in consultation with the Empire State Development Corp. will pursue site control and pre-construction development on potential renewable energy projects

  • Once sites are permitted and developed – auction the sites to renewable energy developers
Step 1: Is the Project Subject to SEQR?

Step 2: Applicant Prepares Environmental Assessment Form (EAF)

Step 3: Municipality Conducts Coordinated Review

Step 4: Municipality Prepares Parts 2 and 3 of the EAF

Step 5: Identify and Evaluate Potential Adverse Impacts

Step 6: Municipality Makes Determination of Significance

Step 8: Municipality Issues Negative Declaration or

Step 9: Municipality Issues Positive Declaration Requiring Preparation of an Environmental Impact Statement
There must be a discretionary action by a municipal board or council (e.g. Site Plan Review) to trigger the SEQR process.

Solar projects are generally classified as Unlisted or Type 1 Actions.

A majority of proposed ground-mounted utility solar projects are classified as Type 1 Actions due to the following criteria:

- The physical alteration of 10 or more acres of expansion of an existing solar facility by 5 acres or more.
- An Unlisted Action that includes a nonagricultural use occurring wholly or partially within an Agricultural District and that exceeds 25% of the Type 1 Action threshold criteria.

Example: The physical alteration threshold of 10 acres would be reduced to 2.5 acres in an Agricultural District, therefore any solar project requiring more than 2.5 acres in an Agricultural District is classified as a Type 1 Action.
Is the Solar Project Subject to SEQR?

- An Unlisted Action that exceeds 25% of any Type 1 Action threshold that is located wholly or partially within, or substantially contiguous to, any publicly owned or operated parkland, recreation area, or designated open space, including any site on the Register of National Natural Landmarks.

**NYSDEC Amendments to SEQR Regulations for Solar Projects**

- The installation of a solar facility that involves the physical alteration of 25 acres or less on the following sites is considered a Type 2 or Exempt Action under SEQR:
  1) Closed Landfills
  2) Brownfield Sites that have received a Certificate of Completion (COC)
  3) Inactive Hazardous Waste Disposal Sites with a Full Liability Release
  4) Disturbed Areas at Publicly-Owned Wastewater Treatment Facilities
  5) Currently Disturbed Areas at Sites Zoned for Industrial Use
  6) Parking Lots or Parking Garages
• The Applicant is responsible for preparing Part 1 of the Environmental Assessment Form (EAF).

• For a Type 1 Action, the Applicant must complete Part 1 of the Long Form EAF.

• The Municipality is responsible for determining if Part 1 is complete and the information presented is accurate.

• Some of the questions on the Part 1 Long Form will require the Applicant to obtain written documentation from certain Involved and Interested Agencies NYSDEC, SHPO, U.S. Fish and support of their response to a particular question.

• The Applicant may also need to conduct field studies, such as a wetland delineation, habitat assessment, or cultural resources survey to provide supporting documentation.
Coordinated Review

• Once Part 1 has been deemed complete, the Municipality is responsible for conducting a coordinated review of Part 1 of the Long Form EAF.

• Municipality Identifies Involved and Interested Agencies

  ➢ An Involved Agency is any agency directly undertaking the project, or is one that is responsible for approval, permitting, or funding.
    ✓ NYSERDA is an Involved Agency if it provides Financial Incentives for the project.

  ➢ An Interested Agency is any agency that may have an interest in the project or its outcome, but is not directly undertaking, approving, permitting, or funding the project.
    ✓ Interested Agencies may need to issue a permit or otherwise approve the project for it to proceed, it is a non-discretionary action.
Typical Involved and Interested Agencies include the following:

- NYSDEC – Permits for Wetlands, Streams, and Threatened/Endangered Species
- NYSDOT – Highway Work Permit
- NYS Dept. of Agriculture and Markets – Impacts to Farmland within an Agricultural District
- NYS Office of Parks, Recreation, and Historic Preservation (SHPO) – Consultation for Historic and Archeological Resources
- U.S. Army Corps of Engineers – Permits for Wetlands and Waters of the United States (May only serve in the capacity of an Interested Agency)
- U.S. Fish and Wildlife Service – Consultation for Threatened and Endangered Species
- County Planning and Farmland Protection Board – Section 239-m Referral and Agricultural District Impacts
- NYS Energy Research and Development Authority (NYSERDA) – Project funding via NY-Sun Financial Incentives
The potential impacts of the proposed solar project are evaluated via the completion of Parts 2 and 3 of the Long Form EAF.

Part 2 of the EAF includes subcategories of questions that enable the Lead Agency to determine if the potential impact is small or moderate to large.

The evaluation of potential impacts can be highly subjective and biased depending upon the sensitivity of the project.

In some cases, the Municipality as Lead Agency may request the Applicant or its Town Designated Engineer to complete Part 2.

If a potential impact is determined in Part 2 to be moderate to large, the potential impact must be further evaluated in Part 3.

The Applicant may be required to conduct field investigations or studies to further evaluate the impact.
Studies that are typically required for the SEQR review of utility-scale solar projects include:

- Wetland Delineations
- Visual Impact Assessments
- Threatened and Endangered Species Habitat Assessments
- Cultural Resource Surveys (Phase 1A Archeological Survey)
- Identification and Evaluation of Farmland Protection Strategies

Based upon the information gathered from the studies, the Applicant can propose design changes regarding the location and/or layout of the solar panel arrays as a form of mitigation.

Mitigation measures such as the creation of earthen berms and/or vegetation screening can be employed to mitigate...
In order to create a **legally defendable** Determination of Significance, the Lead Agency must consider the following factors:

- The entire Project or Action
- The information presented in the Environmental Assessment Form
- Other information provided by the Applicant (e.g. Site Plan documents)
- The criteria presented in 6 NYCRR Part 617.7(c) for determining significance
- Input provided by Involved and Interested Agencies and the Public.

The Lead Agency must determine if the Project will be issued a:

- Negation Declaration (Project has no significant environmental impacts)
- Conditioned Negative Declaration for Unlisted Actions Only (No significant adverse environmental impacts will occur if certain conditions placed on the project are fulfilled)
- Positive Declaration (Project must proceed to the preparation of an Environmental Impact Statement by the Applicant)
SEQR Notification Requirements

• A Negative Declaration for a Type 1 Action or a Positive Declaration must be filed with:
  - Chief Executive Officer of the Political Subdivision in which the Project is located
  - Lead Agency
  - All Involved Agencies
  - Any Person Requesting a Copy
  - The Applicant
  - The Negative Declaration must be published in the Environmental Notice Bulletin (ENB) issued by the NYSDEC.

• A Conditioned Negative Declaration for an Unlisted Action
  - Lead Agency must publish a notice in the ENB and provide a minimum 30 day public comment period starting on the date of publication.
Siting Utility/Large Scale Solar Projects: Municipal Considerations

- SOLAR LAW CONSIDERATIONS, MODEL LAW & APPLICATION PROCESS
- APPROVAL / DENIAL
- DECOMMISSION PLANS
- NECESSITY FOR BONDS & DECOMMISSIONING
- PAYMENT IN LIEU OF TAX AGREEMENT (PILOT) & OPTING OUT OF RPTL § 487
SOLAR LAW CONSIDERATIONS

Norwich, NY Solar Farm; The Evening Sun; Solar Farm Company Hosting Opening Event, Zachary Meseck, (Sept. 23, 2019).
Solar Law Considerations

- Farmland protection - one of the biggest concerns for rural towns
- Especially using the “prime farmlands” for solar sites
  - Incorporating solar technologies on existing grazing or agricultural land could provide an additional income stream to landowners and provide diversification of revenue for years when agricultural productivity is low or for crops that are relatively low value.
Solar Law Considerations

- Regulations Can Address Common Issues
  1. Rezoning
  2. Height
  3. Maintenance
  4. Glare
  5. Setbacks
  6. Required Decommissioning Plans
  7. SEQR Protections
Site Plan or Special Use Permit?

Site Plan Regulations

- A site plan is a drawing that shows the layout, arrangement, and design of a land-use proposal of a single site

  - Site plan regulations enable communities to assure that proposed uses that are **otherwise allowed** are sited and designed in a way that **promotes the appropriate use** of the parcel and zoning classification

Special Use Permits

- Allows a parcel to be used in a way that deviates from the uses of the zoning classification on the property

  - The Special Use Permit allows **nonconforming uses** without requiring rezoning. Subjects the nonconforming use to additional criteria and a detailed review process
Key Points to Address in Solar Energy Local Law

- Site plan and Special Use Permit application requirements including:
  - Proposed Changes to the Landscape (grading, vegetations, planting, exterior lighting)
  - Solar Energy System Layout
  - Contact Information for Proposed Installer and/or Operator of the System
  - Zoning District Designation of the Site
  - Maintenance Plan
  - Erosion and Sediment Control Plan
  - Water Management Plan
  - Document Review Sign off by Town Engineer
  - Escrow Deposits
  - Lot size
  - Setbacks
  - Height
  - Lot Coverage
  - Fencing
  - Screening and Visibility
  - Effect on Agricultural Resources
FINAL BOARD REVIEW FOR APPROVAL OR DENIAL OF THE SOLAR SITE & PROJECT

Key Elements In Board Review of Solar Projects
APPROVAL OR DENIAL RESOLUTIONS

Must be based and supported on actual findings
<table>
<thead>
<tr>
<th><strong>Example Compliance Checklist</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Name of Project</strong></td>
</tr>
<tr>
<td><strong>Location</strong></td>
</tr>
<tr>
<td><strong>Name of Entity</strong></td>
</tr>
<tr>
<td><strong>Megawatts</strong></td>
</tr>
<tr>
<td><strong>Property Owner/Contact Info</strong></td>
</tr>
<tr>
<td><strong>Contact Info For Attorney</strong></td>
</tr>
<tr>
<td><strong>Escrow for Engineer/Atty.</strong></td>
</tr>
<tr>
<td><strong>Status of Land Use</strong></td>
</tr>
<tr>
<td><strong>SUP</strong></td>
</tr>
<tr>
<td><strong>Site Plan</strong></td>
</tr>
<tr>
<td><strong>Variances Needed</strong></td>
</tr>
<tr>
<td><strong>Decommission Plan</strong></td>
</tr>
<tr>
<td><strong>Triggers for Decom.</strong></td>
</tr>
<tr>
<td><strong>Recording Against Prop.</strong></td>
</tr>
<tr>
<td><strong>Opt Out of PILOT</strong></td>
</tr>
</tbody>
</table>
DECOMMISSION PLANS
Decommission Plans

• “The Decommissioning Plan, ... addresses the decommissioning process and funding methods, including a detailed cost estimate. Utility-scale solar facilities typically have a life expectancy of 20-40 years (NYSUN, 2016), with the Facility having an anticipated life expectancy of 30 years. Decommissioning will be triggered if the Facility is non-operational for not less than... [12 months], unless longer period is otherwise agreed to by [the] Town.... At the end of the Facility’s life, decommissioning will commence, to the maximum extent practicable, to preconstruction conditions.” (annotation added)

• Sample Language from: Mohawk Solar LLC., Mohawk Solar Case, No. 17-F-0182, 1001.29, Exhibit 29 Site Restoration and Decommissioning
Decommissioning Plans Should Include These Key Components:

- Data on the **total decommission costs** of the removal of **all of the materials** at the site (professional estimates confirmed by the Town’s Engineer)

- Requirements for removal of **everything from the site** (fence, equipment, concrete, direct access roads, etc.)
Decommissioning Plans Should Include These Key Components:

- **Restoration** of the **green coverage** and **erosion control** measures
- Triggers of abandonment:
  - (1) failure to complete construction within the set time limits; and
  - (2) non-use for any reason (no intent requirement) and
    - Abandonment: System fails to generate and transmit electricity over a continuous period of 12 months. *If Town takes on the decommissioning the unpaid expenses will be a lien on the property.*
Decommissioning Plans Should Include These Key Components:

- Make construction of project to be completed within 12-18 months or less from approval of the site project and/or issuance of building permits.
- The overall cost of the site restoration.
- Address when the Town will have the right to enter the property to conduct decommissioning activities.
- Make plan subject to approval of the Planning Board or Town Board and review by Board Attorney or ZBA.
DECOMMISSIONING BONDS AND SECURITY

Decommissioning Bonds and Security

• Place removal terms in lease with owner and/or the decommissioning plan/agreement- life cycle for solar is typically 20-40 years (lease usually 25 years)

• Decommissioning Bonds/Security place the responsibility on the contracting party (landowner and/or solar developer) to return the subject property to its condition prior to the solar development after the life cycle for the solar site equipment ends.

• May enforce financially: terms in lease, trust, an escrow account (cash), removal/surety bonds, letters of credit, etc.
• The bond company should be on the US Treasury list of certified companies
  ➢ Don’t want to chase a company that is out of the country or is fly by night
• Should be no contest and non-revocable for the life span of the solar development; or provide for automatic renewals
• Provide for notice of cancellation or non-renewal with sufficient time to act
In setting the bond/security amount require submission of engineer estimates to Town Planning Board for Review as part of requirement to be issued a permit for solar system.

Costs of Decommissioning

Periodic Reevaluation, as over time costs may increase or decrease

Include submissions of a valid estimate of the site’s value, cost to remove and make adjustments for prevailing wage and account for inflation.
Payment in Lieu of Taxes Agreement

• New York Real Property Tax Law § 487 allows jurisdictions that offer the exemption to negotiate payments in lieu of taxes (PILOTs).
Purpose & PILOT Length

- reduce the tax burden and tax rate uncertainty on the property and/or system owner

- while preserving some of the forgone revenue that would have been paid in property taxes.

- The PILOT may not exceed a 15-year term, but it also cannot require payments that exceed the value of taxes that would be paid without the exemption provided by RPTL § 487.
PILOT in Local Code/Law

• RPTL § 487 drives the process but you can include it in your code/local laws.
Sample PILOT Program - Town of Greenport, NY Code

• “§ 110-17. Requirements.

A. Any owner or developer of a solar or wind energy system must provide written notification via certified mail to the Town Clerk, with a copy to the Town Assessor, of its intent to construct a solar or wind energy system.

B. The Town shall have 60 days from receipt of the written notification to notify the owner or developer of its intent to require a PILOT.

C. The PILOT schedule for a solar or wind energy system shall adhere to RPTL § 487, Subdivision 9.

D. Prior to the Planning Board's issuance of final site plan approval, and ‘the issuance/approval of a building permit’, the owner or developer of a solar or wind energy system must have a PILOT agreement in place with the Town.” (annotation added).
Estimated PILOT Rates - NYSERDA

<table>
<thead>
<tr>
<th>Company</th>
<th>Low  ($/MW AC)</th>
<th>High ($/MW AC)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central Hudson</td>
<td>$2,600</td>
<td>$7,600</td>
</tr>
<tr>
<td>Orange &amp; Rockland</td>
<td>$3,200</td>
<td>$9,500</td>
</tr>
<tr>
<td>National Grid</td>
<td>$1,700</td>
<td>$5,100</td>
</tr>
<tr>
<td>NYSEG</td>
<td>$1,700</td>
<td>$5,000</td>
</tr>
<tr>
<td>Con Edison</td>
<td>$3,700</td>
<td>$11,100</td>
</tr>
<tr>
<td>Rochester Gas &amp; Electric</td>
<td>$1,700</td>
<td>$5,000</td>
</tr>
</tbody>
</table>

The above table displays sample PILOT rates generated by the “NYSERDA Calculator” for a **2-MW AC community solar project** in each utility service territory. The “Low” and “High” rates represent **1% and 3%** of the compensation solar developers receive for the electricity their projects generate. NYSERDA’s research of solar project economics across the State indicates that such projects should be able to afford rates within this range.
NOTE

• Make the PILOT agreement a condition of any approval or issuance of a building permit for the Solar Project

• Split of funds between the Town, County and School District
Opting out of New York RPTL § 487

- New York RPTL § 487. Exemption from taxation for certain energy systems

- § 487 (8)(a)- Permits municipalities to opt out of the property tax exemption for solar facilities

OPT OUT of RPTL § 487

≠

PILOT AGREEMENTS
Why Would Towns Exercise the Option of Opting out of RPTL § 487?

• Some Towns would rather tax the multimillion-dollar solar projects and generate additional property tax revenue.

• May negatively (or positively, depending on the municipality) affect the probability of proposals for solar projects being submitted to the municipality.
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