

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

Webinar May 22, 2020

Questions & Answers

- 1. Will there be any instruction on the format of the meeting for the benefit of participants new to Zoom?**

Yes, we will be giving instructions on the format

- 2. Will the slides be available after the session for town officials?**

Yes, the webinar recording and PowerPoint Slides will be available on the NYS Tug Hill Commission website at www.tughill.org/services/training/local-government-conference/2020-conference-presentations/.

- 3. Has there been any discussion about how to integrate solar installations with agricultural operations in sustainable way that does not negatively impact the agricultural/environmental productivity of the land?**

There is extensive guidance at the NYS Agriculture & Markets Department with guidelines.

- 4. The PILOT guidance issued by NYSDERDA is unclear about whether or not a municipality is required to opt of the 487 exemption in order to negotiate a PILOT, or whether PILOTs are an option for municipalities regardless of whether or not they have opted out.**

You are not required to opt out. PILOT can be entered into by willing parties regardless of the status.

- 5. It seems like Canajoharie's definition of utility-scale solar would also apply to community solar projects which are typically much smaller than true utility-scale projects meant for the transmission grid. Should municipalities distinguish between the community solar at 5 MW and utility scale up to 25 MW or larger?**

It may be advantageous for each municipality to determine to distinguish between certain types of projects, including community solar versus much larger projects. Towns have the ability to address such issues within its powers under the Municipal Home Rule Law.

- 6. What is the acreage for 20 mw site?**

Depends on the municipality's land laws. Approximately 500-750 acres. NYSDERDA guidelines say 5 acres/mw generally.

- 7. The very large projects; what are the environmental impacts to the communities in which they are located? Will studies be conducted to determine water runoff in areas that were once vegetated, but will become deserts? Wildlife impact, impact to quality of life in the affected communities? Some of these projects are slated for areas that have power from Niagara Falls and already have low impact, clean, and inexpensive power.**

The environmental impacts of any particular project must be identified and examined on a case-by-case basis. Typically, very large projects are associated with potential negative environmental impacts. However, this cannot be determined until the required hard look under SEQRA has been completed by the lead agency.

- 8. Is the prescribed appellate Division appeal review in lieu of Article 78?**

Under newly adopted legislation this must go to the Appellate Division by way of an Article 78.

- 9. So ORES can override a town law that limits for example a 20 acre parcel as the maximum a town allows for a solar project?**

The new regulations as currently written suggests that ORES, while taking into consideration local municipal rules and regulations, may determine that such regulations will not be applied to the proposed project. However, it remains to be seen if, consistent with recent case law, a Town's powers under the Municipal Home Rule Law would trump the new regulations and Executive Law provisions.

- 10. For SEQRA is it area occupied or disturbed, the posts in the ground don't disturb that much ground??**

The size of project controls (inside fence area and access road).

- 11. If a closed landfill is over 25 acres would it be considered a SEQR Type 1 or Unlisted Action? Also can solar be placed on brownfield sites that have not received a COC?**

Landfill size does not matter. Most likely a Type II action for SEQR purposes. Solar cannot be placed on brownfield sites without a COC.

- 12. Shouldn't the threshold for a farm to cease farming meet same criteria as a Use Variance?**

The regulations relating to the conversion of farmland to use for solar energy generation will be guided by the Town's local laws and regulations pursuant to Town Law and Municipal Home Rule Law.

- 13. IDAs would be considered as an Involved Agency, correct?**

Yes, if they provide funding or any approval of any sort.

- 14. Are there concerns if a Solar Farm is going in next to an airport?**

The potential impacts of glare would need to be evaluated in accordance with applicable FAA guidelines.

15. Has any project ever been found to negatively impact ground nesting bird species?

There is at least one Article 10 Solar project currently under review in which the proposed solar panel arrays have been sited in identified Grassland Bird nesting areas. However, it is too early to say if the solar panel arrays will end up having a detrimental impact, as the solar project has yet to be constructed.

16. Please discuss "wildlife friendly" fencing and whether that has been proven to be effective.

B&L has recommended that solar developers incorporate wildlife friendly fencing in the design of their solar facility.

17. How does a developer prove that glare won't be an issue in any particular case? Visualization studies typically don't address this. And why is the burden on the developer, considering that the FAA allows solar on airports even next to runways?

B&L is aware of certain Solar Developers that have utilized computer modeling to evaluate the potential for a solar array to result in glare impacts on sensitive receptors. The potential glare impacts are of particular concern to motorists traveling in vicinity of the solar facility.

18. What makes it prime agricultural soil? A study done back in the 50's or the owner saying they haven't been able to use it in 20 years because of water, soil, other changes etc.?

The NYS Department of Agriculture & Markets has developed an Agricultural Land Classification System for the entire state. Please refer to the NYS Department of Agriculture & Markets for additional information.

19. Current Article 10 requirements exempt industrial projects from compliance to SEQRA requirements as well as local municipality lead agency status. Am I correct in understanding from your presentation that Section 94-c reinstates SEQRA and therefore lead agency status of local municipalities?

Environmental review for all projects must be conducted. Changes to the regulations will address who becomes lead agency for such review.

20. Will section 94C be able to override a local moratorium?

This remains to be seen. Guidance from prior interpretative case law suggests that Towns should continue to possess all rights under the Municipal Home Rule Law and the New York State Constitution. Most likely a Court decision will resolve the answer to this question.

21. Do towns typically have laws that strongly limit the conversion of farmland to residential? If not, why should solar be treated any differently, considering that housing subdivisions have heretofore been the primary reason for taking Ag. Land out of production and does so forever (unlike solar)?

Towns should determine which policies they would like to pursue on behalf of their own communities relative to protection of farmland for any purposes (residential, green energy, or otherwise).

22. What about FAA input on glare?

The FAA has established guidelines for the evaluation of glare impacts from solar facilities. Please refer to the FAA website for additional information.

23. Can a municipality without zoning have a solar law that regulates placement/location of solar projects?

Yes. A Town may adopt stand-alone regulations associated with solar facilities.

24. Could you please provide the name of the court case you mentioned that upholds local zoning in solar siting?

Friends of Flint Mine Solar v. Town of Coxsackie, Index No. 19-0216, Greene County Sup. (September 13, 2019)

25. If a parcel of land is all prime farmland and a state law required utility scale solar farms to be allowed as permitted or conditional/special use, can a local community deny a permit to allow solar farm because prime farmland is more important?

This will be a case-by-case analysis by the reviewing board. Certainly local solar regulations may provide for consideration of the importance and impact to prime farmlands or farmlands of state-wide significance.

26. Should towns consider some sort of drip edge or erosion prevention under individual solar panels, or is that not usually a problem?

Please refer to the NYSDEC Memorandum entitled "Solar Panel Construction Storm water Permitting/SWPPP Guidance" dated April 5, 2018.

27. In your experience, have you seen any GIS analysis to determine glare?

No.

28. I have heard multiple opinions on decommissioning. Trying to keep an open mind on behalf of business and communities. It is my understanding that the mounting/ballast systems are still viable 30-years from now; so instead of decommissioning the entire system, why not have a provision in place for replacement of new technology. Some proposers will tell you that you can get a better PPA rate (or rental rate) if you don't kick their butts with decommissioning bonds, escrows, etc.

Each community may make its own determinations relative to the parameters of decommissioning. We recommended that any comprehensive solar facilities siting law dedicate

a section specifically to decommissioning, including decommissioning plans and decommissioning security (bonds, etc.). The economics of the larger solar generating facilities is dependent on many factors.

29. As part of decommissioning, the cost of recycling or disposal of the panels should also be considered.

This has been suggested by many solar companies and can/should be considered by the municipality when drafting its solar regulations. However, the comments made at the presentation were simply to point out that there may be instances where a solar facility becomes abandoned and left in the hands of either the property owner or to be addressed by the municipality. In such instances, the responsibility of removing/recycling/selling the old panels will fall upon the owner or the municipality. It is therefore not advisable to gauge the decommissioning costs upon future markets or abilities of those parties to participate in the secondary market.

30. Regarding visual impact assessments for utility scale solar, I would be interested to hear the opinion of the panelists on how the change in views from residences due to solar projects should be considered in the SEQRA significance determination. The SEQRA EAF part 2 seemed more geared toward impacts to designated aesthetic resources (parkland, historic sites etc., not residences).

B&L recommends that you refer to the SEQRA Handbook (3rd Edition -2010) issued by the Division of Environmental Permits of the NYSDEC for the evaluation of visual impacts in conducting a SEQRA review.

31. Do towns typically require removal bonds for gas stations? There are hundreds, if not thousands, of abandoned underground storage tanks at gas stations across the state? Or is this handled under state law? If it is handled under state law should the issue of solar removal bonds also be at the state level?

This is dependent on the local regulations of each Town relative to removal bonds. In certain situations, the construction of roads and other improvements are guaranteed by bonds. However, over the years projects such as solar and wind facilities have typically been associated with such removal bonds. Perhaps one difference between a gas station and a solar facility is that typically gas stations are normally built in industrial commercial areas whereas solar farms tend to be on large expanses of agricultural and other open lands. The bonding for removal becomes a hedge against the potential blight left by abandoned solar panels in open fields. Unfortunately, at this time, it is too early to determine the advisability or necessity of these requirements since we are not aware of any solar facilities that have yet become abandoned, gone bankrupt or otherwise.

32. When dealing with PILOTS, address the need for a PILOT Mortgage.

We have had no experience with a PILOT Mortgage.

33. PILOT's under IDA's are specifically prohibited from considering Community Benefits within their calculations, doesn't new law create a loophole for Developers to ignore IDA's?

We will have to see how the new law is put to use regarding IDA involvement.

34. John, Can you provide citations to the cases you referred to regarding RPTL 487 and Municipal Home Rule? Thanks.

Friends of Flint Mine Solar v. Town of Coxsackie, Index No. 19-0216, Greene County Sup. (September 13, 2019)

35. What legal recourse will a municipality have in the event a Solar operator refuses to act on a demand by the municipality to increase the amount of a bond after a annual or 5 year review of a decommissioning plan indicates market rates would require an increase in the bonding amounts?? Would a Town be able to force a cease and desist order onto the Solar Operator?? Until a bond is updated?

If the decommissioning plan and/or the local solar siting law requires increases to the bond amounts periodically and the developer refuses to comply, there will be a technical default under the signed agreements. Ultimately, a Town could potentially go to Court and seek a Court Order directing that the developer comply with the Law.

36. Should schools invert PILOT payments so more upfront and less at conclusion to reduce Tax Cap Affect?

We have not studied the potential impacts to the tax cap but recognize this could be an issue.

37. You need to acknowledge to the participants that if AHJs opt of 487 then they are hurting their residents that have small rooftop systems too.

It is true that the opt-out provision applies to all systems, not just large systems. Again, this is a policy decision by the local municipality and their governing Board.

38. Require a Host Community Agreement in your law, instead of counting on PILOT?

Host Community Agreements are an available option to pursue.

39. Btw above question related to prime farmland is also "State certified prime farmland that qualify for State tax credits.

Acknowledged.

40. Can you speak on battery storage and considerations on the local law?

This would be a good subject for a future presentation. Some communities have included battery storage provisions in their local laws, as well as stand-alone local laws on the subject.

41. Any laws you can recommend beyond NYSERDA?

We recommend that you survey various jurisdictions' solar laws and speak to representatives of those Towns to see how they are working to see what is best for your community.

42. A developer can still approach an IDA for a PILOT if the town has properly opted out of RPTL Sect 487.

Acknowledged.

43. What have you found to be the range of lease payments to the landowner, and how does that compare to a lease to another farmer?

The range of lease payments is dependent upon a multitude of factors, including the utility area, the size of the facility, the expenses experienced by the developer and other factors.

44. How does the NYSDEC classify the impervious surface associated with the panels in regards to the SPDES SWPPP requirements? Is it an adjusted CN (Curve Number) or considered like normal roof areas? Is the area developed considered "redevelopment" if it was previously farmland?

Please refer to the response provided above for Question No. 25 regarding the preparation of SWPPP's for a solar facility.

45. Do you have sources for information on the effect of adjacent land values?

Impacts on land values could be considered relative to any adjacent land uses and certainly would be the subject of future studies as more of these uses proliferate in the State. (BTW - cover your backs). Studies may be found online.

46. Does it make more sense to opt out of Article 487 and tax the projects initially? I have heard this discourages developers from siting projects in communities that have opted out? I believe this also requires a town to tax all solar construction regardless of size and goes against efforts to encourage green energy. Have there been financial comparisons?

The decision to opt out is one to be made by the local taxing jurisdictions. We have seen Towns that have opted-out, which have not discouraged development. Again, this becomes a factor in the economics of the individual developer's analysis.

47. With projects before our county IDA, all billings for PILOT payments must be based upon the proportionate tax rates of the three jurisdictions involved. Any tax payment under a PILOT Agreement must be made as a proration corresponding to the existing tax rates. If that is the established law for PILOT Agreements, why can municipalities negotiate a different proration for solar projects?

It has been our position that entering into a PILOT Agreement is a contractual negotiation. In addition, negotiation positions change in the event that a Town, Village, School or County has failed to respond to the notice by the developer of the intent to establish a solar facility. We have seen instances where developers have refused to provide a PILOT Agreement to certain

taxing jurisdictions (who had failed to trigger the PILOT request) leaving 2 to 3 of the taxing jurisdictions left in the negotiations.

48. Will Ag Land have to be resurveyed/reassessed for partial use for solar farms?

Dependent on the reviewing board, it is not an unreasonable comment to have the land area under consideration properly surveyed.

49. Can you discuss the valuation/tax assessment methodology that municipalities use for solar projects?

The determination for reassessment is one made by the assessor in the taxing jurisdiction. Assessors may obtain guidance and advice from NYSERDA and the Office of Real Property Services with regard to methodologies for assessment. Assessors may also seek guidance from appraisers with knowledge in this field.

50. What is the average assessed value per MW on these projects under normal taxation? How much of a discount does the developer get by using a PILOT?

The panel has not seen information relative to this question at this time.

51. If project over 25 MW ... why are they even available for exemption? How are they not valued like national grid/ other utilities?

In our experience, the Town may still opt out of any exemption.

52. Given current NYS renewable energy goals, how many acres of land are expected to be needed for commercial solar arrays statewide?

As previously noted, approximately 5 acres of buildable land per MW is required for a solar facility. However, some municipalities have incorporated guidelines in their solar law that restrict the type of land on which solar facilities may be constructed, in addition to limiting the amount of land per parcel that may be developed with a solar facility.

53. What happens if a community does not institute a PILOT requirement NOR does it opt out?

If there is neither an opt out taken by a taxing jurisdiction nor a PILOT instituted, the project is exempt for a period of 15 years under Section 487 of the Real Property Tax Law.

54. How would a town ever know if one or more of the panels isn't functioning, in terms of making that a trigger for decommissioning?

Certainly with larger projects it would not be known if individual panels are not functioning. Under its local law and/or any written agreement with the developer, the Town may request annual or semi-annual reports relative to the functionality of the project. These could be certified by an independent engineer or by the developer.

55. Are PILOT's available publically?

Yes. Anyone may obtain a copy of a signed PILOT Agreement by way of the Freedom of Information Law.

56. Are you saying the 60 day period starts when the applicant states their considering our community for a solar project, not when it is sent to the Code Office?

Our advice has been that upon any contact by the developer with the Town Assessor, Town Board, Supervisor/Mayor, Codes Office, etc. that a letter be sent requesting a PILOT Agreement. In the event of a more formalized request, a second letter could and should be sent.

57. What is the justification for extensive regulations for utility solar facilities while other uses on the same property that could have much larger environmental impact are not regulated? As an example, a large 1M ft² warehouse could be placed on prime agricultural land. It would create a large impervious surface creating runoff, permanently prevent future agricultural use, could not be screened from nearby properties and in use create 24 hr. noise and extensive truck traffic. A utility scale solar facility on the same property in some cases would not be allowed due to the prime soils, would require extensive bonding for decommissioning and a more stringent review even though it could easily be screened due to lower height, creates no traffic or noise after completion of construction and could co-exist with agricultural uses such as sheep grazing or could be used for agriculture when decommissioned.

This is a policy determination made by the individual municipality in these instances. It is agreed that a large (1,000,000 sq. ft.) warehouse should be carefully reviewed under SEQRA.

58. Suggest criteria for requiring large surface area buildings to require solar on their roofs. Using example above and with some current zoning laws, even though a standalone utility scale solar project would not be allowed on a site, it would be allowed on top of a warehouse on that same site.

The requirement to utilize large surface area buildings for solar would be a good inclusion in any proposed comprehensive solar siting law. This has been encouraged recently.

59. Discuss ground rules and techniques for determining assessed value of utility scale solar installations in following cases.

- a. Standalone solar facility
- b. Solar facility on rooftop of large building
- c. Solar installation on active farmland where grazing or other agricultural practices take place under the panels.

The termination relative to assessed values utility scale operations is determined by the Assessor's Office, with guidance from any number of professionals and their agencies, including the Office of Real Property Services, appraisers and similar entities.