Cannabis Law and Municipal Authority

Municipal Law Seminar
May 14, 2025

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Presented by
Danielle Holmes and Patricia Heer

PART I

KEEP ON KNOCKING BUT YOU CAN'T COME IN

(Can I see your license?

It's back there on the bumper, man)

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Local Law: Inspecting and Closing Unlicensed Cannabis Businesses

- Enforcement Bill was passed in 2024, giving local authorities the ability to enact local laws giving them the authority to conduct inspections, searches, seizures, and closures of unlicensed cannabis shops
- The authority is not carte blanche and has many important limitations.

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Statutory Authority

- Authority Granted Under the Cannabis Law §131(3) for local inspection regimes

CORE REQUIREMENTS

- Establish reasonable inspection procedures that maintain administrative nature
  - Designate official liaison to Office of Cannabis Management
    - File local law with Office of Cannabis Management
  - Create a complaint system for reporting of unlicensed activity
  - Implement civil penalty structure (within state parameters)

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Statutory Authority

- Authority Granted Under the Cannabis Law §131(3) for local inspection regimes

Enforcement Powers

- Issue violations and cease orders
- Seize unlicensed cannabis products
- Order premises sealing in specific circumstances
- Follow mandatory state procedures for building sealing

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Statutory Authority

- Authority Granted Under the Cannabis Law §131(3) for local inspection regimes

Important Limitations

- County laws vs city laws
- Residential properties
- Hours of inspections
- Civil administrative purposes only
- Mandatory adoption of state sealing procedures

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Statutory Authority

- Authority Granted Under the Cannabis Law §131(3) for local inspection regimes

Procedural Considerations

- Reporting requirements
- "Reasonable manner" requirements
- Chain of custody documentation
- Service of Notice to Cease, Order to Seal
- Hearing timelines and requirements
- Coordination with state enforcement efforts

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Statutory Authority

- Authority Granted Under the Cannabis Law §131(3) for local inspection regimes

Constitutional & Procedural Safeguards

- Time, place, and scope
- Imminent threat standards
- De minimis business activity exception
- Court review standards
- Verification statement requirements

What We've Learned Through The Courts:

- Effectuating Service
- Directory Limitations
- Statutory Boundaries
- Warrantless Search Limits

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PART II

SIGN, SIGN

EVERYWHERE A SIGN

(Dispensary, Dispensary
Everywhere a Dispensary)

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How Many Dispensaries

- Do We Need
- Do We Want
- Can We Have

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How Many Dispensaries Can We Have

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Existing AU Regulation § 119.4

No retail dispensary license or microbusiness license shall be granted for any premises which shall be:

- (1) ***within a 1,000 ft*** radius of … any other premises for which a retail dispensary license or microbusiness license has been issued in a municipality having a ***population of 20,000 or more***
- (2) ***within a 2,000 ft*** radius of … any other premises for which a retail dispensary license or microbusiness license has been issued in a municipality having a ***population of 20,000 or less***

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Exception §119.4

No retail dispensary license or microbusiness license shall be granted for any premises which shall be within [1,000 or 2,000 feet] unless the Board has determined that issuing the license would promote ***public convenience and advantage***

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Public Convenience and Advantage Factors §119.4

- (1) the number, classes, and character of other licenses in proximity to the premises and in the particular municipality or subdivision thereof;
- (2) evidence that all necessary licenses and permits have been obtained from the state and all other governing bodies;
- (3) whether there is a demonstrated need for such license;
- (4) effect of the grant of the license on pedestrian or vehicular traffic, and parking, in proximity to the premises;
- (5) the existing noise level at the premises and any increase in noise level that would be generated by the proposed premises;
- (6) the history of cannabis violations and reported criminal activity at the proposed premises; and
- (7) any other factors specified by law or regulation that are relevant to determine that granting a license would promote public convenience and advantage of the community.

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Proposed New AU Regulation § 119.4

No retail dispensary license or microbusiness license shall be granted for any premises that shall be:

- (1) ***within a 500 ft*** radius of … any other premises for which a retail dispensary license or microbusiness license has been issued in a municipality having a ***population of 20,000 or more***
- (2) ***within a 1,000 ft*** radius of … any other premises for which a retail dispensary license or microbusiness license has been issued in a municipality having a ***population of 20,000 or less***
- (3) ***between 500 to 1,000 ft*** radius of … any other premises for which a retail dispensary license or microbusiness license has been issued in a municipality having a ***population of 20,000 or more, unless*** the existing licensee has been ***operating for at least 9 months*** and the licensee or applicant seeking waiver has demonstrated to the board that issuing the license for the location would ***promote public convenience and advantage***
- (4) ***between 1,000 to 2,000 ft*** radius of … any other premises for which a retail dispensary license or microbusiness license has been issued in a municipality having a ***population of 20,000 or less, unless*** the existing licensee has been ***operating for at least 9 months*** and the licensee or applicant seeking waiver has demonstrated to the board that issuing the license for the location would ***promote public convenience and advantage***

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New Exception §119.4

No retail dispensary license or microbusiness license shall be granted for any premises which shall be within [certain feet] unless the Board has determined that issuing the license would promote ***public convenience and advantage***

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New Public Convenience and Advantage Factors §119.4

- (1) the distance from any other existing approved licensee locations within: (i) 1,000 feet of the location in jurisdictions where the minimum distance between retail dispensaries is 500-feet; or (ii) 2,000 feet in jurisdictions where the minimum distance between retail dispensaries is 1,000-feet;
- (2) any geographic, structural, or topographic barriers that separate the proposed location from any existing retail dispensary locations, e.g., waterways, major roadways or highways, and significant travel distance required to get between the two locations;
- (3) the distance between the proposed location and any existing retail dispensary location, when measured as a pedestrian or car would travel;
- (4) any factors unique to the proposed location, including any environmental or economic, or circumstantial considerations that justify its placement and/or a need for greater adult use cannabis consumer access in the local area, including, but not limited to:
  - (i) economic justification that highlights high consumer demand for additional retail dispensaries or retail microbusinesses in the area;
  - (ii) the number of illicit cannabis dispensaries or former illicit dispensaries in close proximity to both the existing and proposed locations;
  - (iii) existing social and economic equity licensees within the applicable radius of the location; and
  - (iv) any other factors submitted by the requestor.

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Oversaturation

The State of New York has a regulatory interest in the economic development of the cannabis market; ensuring that market growth proceeds in a manner that is reasonable, ordered, transparent; and the minimization of the collateral consequences resulting from inattention to the pace of growth.

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Process for Requesting Waiver

- A notice, to the applicable local municipality … of the licensee or applicant's intention to submit a public convenience and advantage request…
- that notice must include a copy of the application to be submitted to the board and
- state that the municipality … has a maximum of 45 days to submit a response …
- The board cannot act on the request until the municipality or community board submits a response or the expiration of the 45-day period, whichever happens first.

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Considerations

- Focus on Municipality Response
- Municipality v. Individual
- Effective Date of New Regulations
  - Public Comment Period: 4/2-5/19
  - Assessment
  - Further Revisions
- Interim Period

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PART III

CLOSING TIME
YOU DON'T HAVE TO GO HOME
BUT YOU CAN'T STAY HERE

(So Where or What Can a Dispensary Do?)

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Cannabis Law § 85(12)

The board is authorized to promulgate regulations governing licensed adult-use dispensing facilities, including but not limited to, the hours of operation, size and location of the licensed facility…

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AU Regulations § 119.2

Municipalities are authorized to adopt local laws and regulations governing the ***time, place, and manner***; provided that such local laws and regulations shall not be ***unreasonably impracticable***. The following activities constitute the permissible time, place, and manner restrictions that may be imposed by a municipality:

- Hours
- Visual or architectural integrity of the building in historical districts
- Parking
- Traffic control
- Odor
- Noise
- Distance to Public Youth Facility

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Unreasonably Impracticable

- Standard
- Process

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Zoning

- Business Districts
- Adult Business Districts
- Historical Districts

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Real Property Tax: Case and Statutory Law Update

Municipal Law Seminar
May 14, 2025

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Presented by
Henry A. Zomerfeld, Esq.

Overview

- Solar and Wind
  - RPTL 575-b assessment model
  - Case law update
  - RPTL 487 exemption
  - PILOT and HCA trends
- RPTL 420-a non-profit exemption
- Q & A

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Renewable Projects and Property Taxes

- The rise of renewable energy physical infrastructure in the form of wind, solar, energy storage, geothermal, and other generating facilities has created significant questions for purposes of real property tax valuation.
- The purpose of this discussion is the focus on what the state has dictated as the methodology for wind and solar, how it is to be employed, and what are the likely next steps in the process.

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Why RPTL § 575-b?

- Up until the law, local assessors set assessment values for wind and solar projects.
- Assessors used different methods to value the projects, including the costs method, which tends to overvalue. So values differed by jurisdiction.
- Before the law, developers lacked certainty about the tax costs of their projects, particularly where a payment-in-lieu-of-taxes (“PILOT”) agreement was not being negotiated.
- Assessors are not required to establish values until after projects are constructed or at least partially constructed, as of the taxable status date.
- Few projects have come before the courts, although virtually every appraisal submitted into court or in support or opposition to project assessments by independent appraisers, was prepared on the income capitalization basis.
- The Legislature wanted to bring more uniformity and certainty to these projects, particularly given climate goals under the CLCPA.

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Why not the Cost Method?

- Some assessors argued that the cost basis was the required methodology, but the New York Court of Appeals disfavors the use of cost because "the reproduction cost less depreciation formula … is the one most likely to result in overvaluation and, thus, its use is generally limited to properties deemed "'specialties.'" *Saratoga Harness Racing Inc. v. Williams*, 91 N.Y.2d 639, 646 (1998).
- For solar and wind projects, the income and expenses, and market-based expectations related to discount rates, are available both for the industry and for specific projects. As such, they do not qualify as specialty properties.

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The Issue is Real Property Value

- It’s about the value of the real property, not the value of the project.
- A significant misconception has been that the purpose of the valuation is what a willing buyer would pay a willing seller for the project, but the only issue is the real property valuation.
- Like any business, a significant portion of the value is not in the real property. Taxation is concerned with only real property values.

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What does RPTL § 575-b do?

- First, it resolves the issue of how the assessed value for solar and wind projects will be determined by requiring discounted cash flow (“DCF”) be used.
- Second, it establishes both the Model and the applicable discount rates to be used.
- The law also requires the Department of Taxation and Finance (“DOTF”) consult with the New York State Assessors Association and New York State Energy Research and Development Authority (“NYSERDA”) in carrying out the legal mandates.
- Additionally, there is a public comment period to allow input on the Model and the rates, each of which will be updated each year.
- Only wind and solar projects equal to or greater than one MW nameplate capacity are covered by the law.
- All projects as of the 2022 taxable status date will be assessed using the model, not just new projects. But since the Model and rates are to be updated each year, the Model is limited to the applicable tax year (even though it shows a 25-year depreciation).
  - Caveat: 2025 *Airey* litigation

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How does the Model work?

- The Model utilizes earnings before interest, taxes, depreciation, and amortization (“EBITDA”).
- DOTF has published three variations of the DCF Model and associated discount rates: Large-scale solar (5 megawatts and larger), Value of Distributed Energy Resources (“VDER”) Solar 1-5 megawatts, and Wind 1 megawatt and larger.
- As required by the legislation, DOTF included regional differences by incorporating the different New York Independent System Operator (“NYISO”) zones, as well as the local utility.

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About the Discount Rates

- The discount rates are pre-tax Weighted Average Cost of Capital ("WACC") calculations with different ratios between debt and equity for each of the three project types.
- The Models follow New York law by using the "assessor's formula," where the local full-value property tax rate is added to the DOTF-established discount rate to determine the rate to be used in valuing the property.
- It is not clear where DOTF obtained its discount rates, as they have not disclosed the source. Neither assessors (too high!) nor the industry (too low!) think DOTF's rates are appropriate.

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Using the Model

- NYISO Zone
- Project type: Solar (fixed or tracker) or land-based wind
- Project size in ac (MW converted to KW (multiple MW by 1000) *i.e.*, 5 MWac = 5,000 KWac).
- Applicable tax rates and equalization rate to calculate tax load.
- Annual land lease and escalator if applicable.
- Value of Distributed Energy Resources ("VDER") inputs if applicable.

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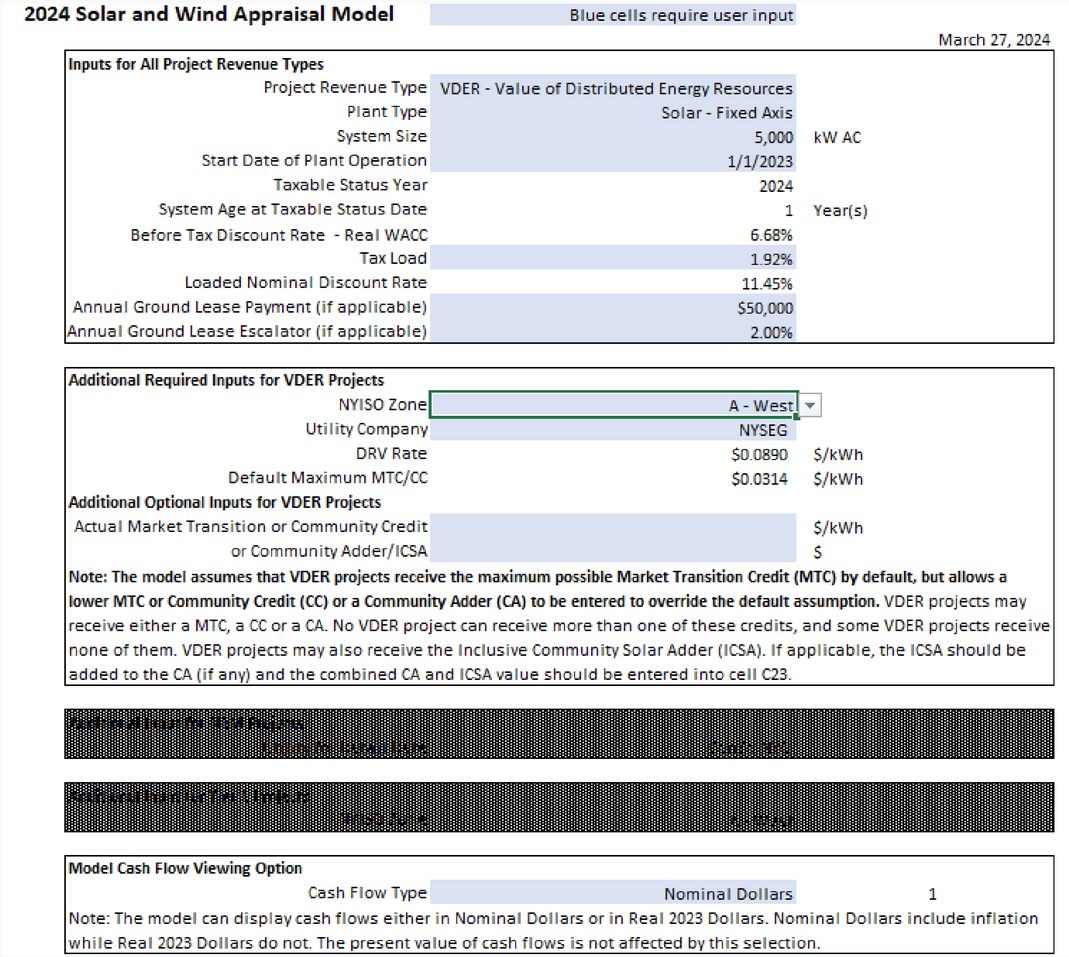
Using the Model



2024 Solar and Wind Appraisal Model — Blue cells require user input

March 27, 2024

Inputs for All Project Revenue Types		
Project Revenue Type	VDER - Value of Distributed Energy Resources	
Plant Type	Solar - Fixed Axis	
System Size	5,000	kW AC
Start Date of Plant Operation	1/1/2023	
Taxable Status Year	2024	
System Age at Taxable Status Date	1	Year(s)
Before Tax Discount Rate - Real WACC	6.68%	
Tax Load	1.92%	
Loaded Nominal Discount Rate	11.45%	
Annual Ground Lease Payment (if applicable)	$50,000	
Annual Ground Lease Escalator (if applicable)	2.00%	

Additional Required Inputs for VDER Projects		
NYISO Zone	A - West	
Utility Company	NYSEG	
DRV Rate	$0.0890	$/kWh
Default Maximum MTC/CC	$0.0314	$/kWh
Additional Optional Inputs for VDER Projects		
Actual Market Transition or Community Credit		$/kWh
or Community Adder/ICSA		$

Note: The model assumes that VDER projects receive the maximum possible Market Transition Credit (MTC) by default, but allows a lower MTC or Community Credit (CC) or a Community Adder (CA) to be entered to override the default assumption. VDER projects may receive either a MTC, a CC or a CA. No VDER project can receive more than one of these credits, and some VDER projects receive none of them. VDER projects may also receive the Inclusive Community Solar Adder (ICSA). If applicable, the ICSA should be added to the CA (if any) and the combined CA and ICSA value should be entered into cell C23.

Model Cash Flow Viewing Option		
Cash Flow Type	Nominal Dollars	1

Note: The model can display cash flows either in Nominal Dollars or in Real 2023 Dollars. Nominal Dollars include inflation while Real 2023 Dollars do not. The present value of cash flows is not affected by this selection.

5MW AC solar project in Western New York with land lease

Using the Model

Calendar/Tax Year	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032
Year of Plant Operation	1	2	3	4	5	6	7	8	9	10
Energy Production (kWh)	8,215,071	8,196,390	8,132,920	8,091,845	8,050,770	8,031,639	7,968,619	7,927,544	7,886,468	7,866,887
VDER Revenues:										
Energy	-	391,696	344,974	395,287	386,339	369,768	346,680	322,150	302,059	278,131
Capacity	-	34,321	33,687	33,207	31,848	30,292	29,020	27,650	26,419	24,571
DRV Rate	-	56,953	56,464	57,238	56,858	55,431	55,434	55,236	54,753	55,408
MTC or CC	-	238,064	236,221	235,028	233,835	233,279	231,449	230,256	229,062	228,494
Community Adder/ICSA	-	-	-	-	-	-	-	-	-	-
VDER Revenues Total	-	721,035	671,346	720,760	708,880	688,770	662,583	635,291	612,294	586,604
[redacted]										
[redacted]										
Income	$ -	$ 721,035	$ 671,346	$ 720,760	$ 708,880	$ 688,770	$ 662,583	$ 635,291	$ 612,294	$ 586,604
Expense*	$ -	$ 69,598	$ 71,338	$ 73,121	$ 74,949	$ 76,823	$ 78,743	$ 80,712	$ 82,730	$ 84,798
Lease	$ -	$ 51,000	$ 52,020	$ 53,060	$ 54,122	$ 55,204	$ 56,308	$ 57,434	$ 58,583	$ 59,755
Decomissioning	$ -	$ 9,584	$ 9,584	$ 9,584	$ 9,584	$ 9,584	$ 9,584	$ 9,584	$ 9,584	$ 9,584
Inverter (Solar Only)	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -
Expenses	$ -	$ 130,181	$ 132,941	$ 135,765	$ 138,654	$ 141,611	$ 144,635	$ 147,730	$ 150,897	$ 154,136
EBITDA	$ -	$ 590,854	$ 538,404	$ 584,995	$ 570,225	$ 547,159	$ 517,947	$ 487,561	$ 461,397	$ 432,467
Discount Factor	1.0000	0.8973	0.8051	0.7224	0.6482	0.5817	0.5219	0.4683	0.4202	0.3771
Discounted Cash Flow	$ -	$ 530,168	$ 433,487	$ 422,623	$ 369,642	$ 318,260	$ 270,326	$ 228,331	$ 193,885	$ 163,064

Present Value of Cash Flows: **$ 3,546,444** **Value for Improvements Only**
$ 709 **/ kW AC**

Note the model will show depreciation for 25 years.
For illustrative purposes, the snapshot above shows only ten years.

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Using the Model

Calendar/Tax Year	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032
Year of Plant Operation	1	2	3	4	5	6	7	8	9	10
Energy Production (kWh)	8,215,071	8,196,390	8,132,920	8,091,845	8,050,770	8,031,639	7,968,619	7,927,544	7,886,468	7,866,887
VDER Revenues:										
Energy	-	391,696	344,974	395,287	386,339	369,768	346,680	322,150	302,059	278,131
Capacity	-	34,321	33,687	33,207	31,848	30,292	29,020	27,650	26,419	24,571
DRV Rate	-	56,953	56,464	57,238	56,858	55,431	55,434	55,236	54,753	55,408
MTC or CC	-	238,064	236,221	235,028	233,835	233,279	231,449	230,256	229,062	228,494
Community Adder/ICSA	-	-	-	-	-	-	-	-	-	-
VDER Revenues Total	-	721,035	671,346	720,760	708,880	688,770	662,583	635,291	612,294	586,604
[redacted]										
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[redacted]										
[redacted]										
[redacted]										
Income	$ -	$ 721,035	$ 671,346	$ 720,760	$ 708,880	$ 688,770	$ 662,583	$ 635,291	$ 612,294	$ 586,604
Expense*	$ -	$ 69,598	$ 71,338	$ 73,121	$ 74,949	$ 76,823	$ 78,743	$ 80,712	$ 82,730	$ 84,798
Lease	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -
Decomissioning	$ -	$ 9,584	$ 9,584	$ 9,584	$ 9,584	$ 9,584	$ 9,584	$ 9,584	$ 9,584	$ 9,584
Inverter (Solar Only)	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -
Expenses	$ -	$ 79,181	$ 80,921	$ 82,705	$ 84,533	$ 86,407	$ 88,327	$ 90,296	$ 92,314	$ 94,382
EBITDA	$ -	$ 641,854	$ 590,424	$ 638,055	$ 624,347	$ 602,363	$ 574,256	$ 544,995	$ 519,980	$ 492,222
Discount Factor	1.0000	0.8973	0.8051	0.7224	0.6482	0.5817	0.5219	0.4683	0.4202	0.3771
Discounted Cash Flow	$ -	$ 575,930	$ 475,370	$ 460,956	$ 404,726	$ 350,370	$ 299,714	$ 255,228	$ 218,503	$ 185,594

Present Value of Cash Flows: $ 4,021,895 **Value for Improvements and Land Necessary for Plant Operations**

$ 804 **/ kW AC**

Same inputs without land lease

What does RPTL § 575-b *not* do?

- RPTL § 575-b does not change the basics of New York assessment law. It changes only the methodology required and the discount rate to be employed.
- Assessments still cannot exceed fair market value, a limitation in the State Constitution, art. XVI, § 2 ("Assessments shall in no case exceed full value.").
- Per the Court of Appeals, the "concept of 'full value' is typically equated with market value, or what 'a seller under no compulsion to sell and a buyer under no compulsion to buy' would agree to as the subject property's price." *Matter of Allied Corp. v. Town of Camillus*, 80 N.Y.2d 351, 356 (1992).

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RPTL § 575-b and PILOTs

- The Model does not address the financial viability of projects where a PILOT agreement is not available from one or more jurisdictions or through the industrial development agency.
- Few if any energy-generating plants of any type in the state can afford to pay full taxes. Setting fair valuations will not address this situation, which presents a significant impediment to achieving New York's climate change goals.
- The Model will also not inform municipalities as to what is a fair PILOT. Though NYSERDA previously produced a PILOT tool which helped numerous communities and developers reach agreement based on an understanding of what projects can afford.
- At most, the Model establishes the outer limit of RPTL § 487 PILOT agreements, which cannot exceed full taxation.

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Donald Airey, et al. v. State of N.Y. Index No. 903991-24 (Albany Cnty.)

- Second challenge to the RPTL 575-b model by municipalities and town supervisors.
- Previously, the first iteration of the model was challenged on grounds that it did not comply with the State Administrative Procedure Act. *See Town of Blenheim, et al. v. Hiller, et al.*, Index No. 903157-2022.
- At that time, the court issued a temporary restraining order enjoining the model. This was done right around tentative roll publication deadline, resulting in confusion.
- That case was resolved by legislative action through the budget bill.

Donald Airey, et al. v. State of N.Y. Index No. 903991-24 (Albany Cnty.)

- This time around, the suit focuses on the model methodology itself, challenging it on various constitutional grounds.
- State sought summary judgment dismissing the petition on the grounds that petitioners do not have standing, that petitioners failed to demonstrate the statute is unconstitutional, and they failed to state a claim under Article 78.
- Petitioners claim that the model results in lost tax revenue to communities and does not apply a uniform methodology.

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Donald Airey, et al. v. State of N.Y. Index No. 903991-24 (Albany Cnty.)

- This includes, according to Petitioners, errors in depreciation, the failure to include investment tax credits, and the failure to include ITCs.
- Credits are intangibles, which are not taxable under the NYS Constitution, which is why these were excluded.
- By statute, the model itself is created by NYS Department of Taxation and Finance, in consultation with the New York State Energy Research Development Authority and NYS Assessors Association.

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Donald Airey, et al. v. State of N.Y. Index No. 903991-24 (Albany Cnty.)

- State sought summary judgment dismissing the petition on the grounds that petitioners do not have standing, that petitioners failed to demonstrate the statute is unconstitutional, and they failed to state a claim under Article 78.
- After submissions, the court held a hearing.
- The hearing focused on whether DTF acted within the scope of authority granted to it by the Legislature in creating the 2024 Model.
- The Court assumed that the delegation of authority was constitutional, so those arguments were not at issue.

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Donald Airey, et al. v. State of N.Y. Index No. 903991-24 (Albany Cnty.)

- Court found that the state illegally delegated its authority to DOTF and therefore struck down the statute (and therefore the model).
- Currently on appeal where the state moved for confirmation of the automatic stay under the CPLR or alternatively granting of a discretionary stay.
- Motion will be heard in May - - after tentative rolls published.
- In the meantime, DOTF finalized 2025 assessment model.
- Interesting questions as to what this meant for 2025 tentative roll values.

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Donald Airey, et al. v. State of N.Y. Index No. 903991-24 (Albany Cnty.)

- What method is appropriate?
  - Discounted cash flow (as the petitioners argued in their opposition to the state's stay motion) but in a manner outside the model?
  - 2025 model finalized before May 1, 2025?
  - Something else?
- More assessment challenges as a result?
- Expected decision on appeal in 2026.

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The RPTL § 487 Exemption

- Applicants file exemption form with local assessor by taxable status date (usually March 1 in most jurisdictions).
- Provides a 15-year real property tax exemption for certain renewable energy systems, including wind and solar.
- Amount of the exemption is equal to the increase in value of the property caused by adding the system i.e., the improvement value.
- Does not exempt these systems from special assessments or ad valorem levies.

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PILOT Agreements

- “A county, city, town, village or school district, [ ] that has *not* acted to remove the exemption under this section may require the owner of a property which includes a solar or wind energy system which meets the requirements of subdivision four of this section, to enter into a contract for payments in lieu of taxes. Such contract may require annual payments in an amount *not to exceed* the amounts which would otherwise be payable but for the exemption under this section. If the owner or developer of such a system provides written notification to a taxing jurisdiction of its intent to construct such a system, then in order to require the owner or developer of such system to enter into a contract for payments in lieu of taxes, such taxing jurisdiction must notify such owner or developer of its intent to require a contract for payments in lieu of taxes *within sixty days of receiving the written notification*.” RPTL § 487(9)(a) (emphases and brackets added).
- No PILOT mandated for standalone storage systems.

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Demanding a PILOT Agreement

- For jurisdictions that have not opted out of the RPTL § 487 exemption, they can demand a PILOT Agreement up to, but not to exceed, full taxes.
- 60-day window upon receiving RPTL § 487 notice from developer.
- Strict deadline. Failure to make a timely demand waives right to PILOT Agreement, so project will be exempt for 15 years.
- Act promptly upon receipt of notice.

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PILOT Agreements

- With the RPTL 575-b model, first year taxes can be determined.
- As such, parties can be informed in their PILOT negotiations since RPTL 487 caps PILOTs at full taxes.
- Before the model, many PILOTs ended up exceeding this cap.
- But some communities have policies that can exceed full taxes at times (e.g., Orange County's $10,000/MW all in).

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Host Community Agreements

- Intended to compensate the town for any impacts brought about by the project or off set the consumption of certain town services.
- Often in addition to a PILOT.
- Not mandated by statute.
- Methodology and valuation dealt with on a case-by-case basis in negotiations.
- Payments could be over a term and track a PILOT (15 years) or be a lump-sum payment.
- Receipt of funds, like a host community agreement, cannot be a condition of land use approvals.

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Non-Profit Exemption Under RPTL 420-a

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RPTL 420-a Non-Profit Exemption

- Real property **owned** by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes, or for two or more such purposes, **and used exclusively for** carrying out thereupon **one or more of such purposes** either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section.

  RPTL § 420-a(1)(a)(emphases added).

- Both *ad valorem* and special district assessments and levies are exempt. RPTL § 420-a(8).

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“Exclusive” Use

- Despite the Merriam-Webster Dictionary definition of the term “exclusive” as “being limited to as single person, group, or category” *i.e.*, solely, the courts have interpreted the statute with a more forgiving view.
- Instead, “the word ‘exclusive’ has been held to connote ‘principal’ or ‘primary.’” *See, e.g.*, *Matter of Adult Home at Erie Sta., Inc. v. Assessor, City of Middletown,* 10 N.Y.3d 205, 208 (2008).
- As a result of this broader view, courts have allowed non-profit entities to contract with for-profit entities for operations at the exempt property without the loss of the exemption. In such instances, the for-profit operations must be incidental to the exempt purpose of the exempt entity. *See Pace College v. Boyland,* 4 N.Y.2d 528 (1958).

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Eligibility

“To qualify for this tax exemption, ‘(1) the entity must be organized exclusively for purposes enumerated in the statute, (2) the property in question must be used primarily for the furtherance of such purposes, and (3) no pecuniary profit, apart from reasonable compensation, may inure to the benefit of any officers, members, or employees, and (4) the entity may not be simply used as a guise for profit-making operations.’” *Matter of Tap, Inc. v. Dimitriadis*, 49 A.D.3d 947, 947-948 (3d Dep’t 2008).

In practice, the two most common issues raised deal with either ownership or use. Ownership by an exempt entity is much easier to dispose of, while use for an exempt purpose is a fact-intensive inquiry.

RPTL 420-a Non-Profit Update

***Matter of First United Methodist Church in Flushing v. Assessor, Town of Callicoon*, 230 A.D.3d 885 (3d Dep't 2024)**

- Religious not-for-profit operates a church in Queens.
- Church purchased 70 acres of land in Callicoon and then applied for the RPTL 420-a exemption, which the assessor denied. The board of assessment review upheld the denial.
- The basis for the denial was a factual question whether the land was used as a church and whether such use violated the local zoning law.
- Under the town's zoning law, a church is not permitted in any zoning district without a special permit or use variance.

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RPTL 420-a Non-Profit Update

***Matter of First United Methodist Church in Flushing v. Assessor, Town of Callicoon*, 230 A.D.3d 885 (3d Dep't 2024)**

- In various submissions to the town, petitioner represented that the property included a prayer house, a chapel and a retreat center for religious purposes, as well as a fruit and vegetable garden that was farmed for the benefit of the members of the church congregation.
- The petitioner did not have a special use permit or use variance to operate as a church, as the local zoning law defined.
- The trial court held that the land was exempt from taxation under RPTL 420-a. The town appealed.
- On appeal, the Appellate Division found that the record reflected the property was occasionally used for religious retreats and services.

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RPTL 420-a Non-Profit Update

***Matter of First United Methodist Church in Flushing v. Assessor, Town of Callicoon*, 230 A.D.3d 885 (3d Dep't 2024)**

- The Appellate Division held that the town did not prove that the subject property was regularly used to conduct organized religious services and therefore the infrequent use did not violate the local zoning law.
- The dissenting justice wrote to indicate that since any of the uses at issue were not allowed by the local zoning law, the exemption should not have been granted on that basis.
- The Court of Appeals granted the town leave to appeal, and the appeal is pending.

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RPTL 420-a Non-Profit Update

Matter of First United Methodist Church in Flushing v. Assessor, Town of Callicoon, 230 A.D.3d 885 (3d Dep't 2024)

- The outcome will resolve divide in case law as to whether compliance with local zoning law is required as a prerequisite to obtain RPTL 420-a exemption
  - *Matter of Legion of Christ, Inc. v. Town of Mount Pleasant*, 1 N.Y.3d 406, 412 (2004) (special use permit could not be required as prerequisite for obtaining RPTL § 420-a exemption).
  - *Community Humanitarian Ass'n, Inc. v. Town of Ramapo*, 137 A.D.3d 736, 738 (2d Dep't 2016) ("even assuming that a zoning violation had been sufficiently established . . . [n]ot all violations of law automatically result in the loss of a tax exemption.") (ellipsis added).
  - Where the use is not permitted, the exemption cannot be obtained. *Matter of Geneva Gen. Hosp. v. Assessor of Town of Geneva*, 108 A.D.3d 1043, 1045 (4th Dep't 2013).

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RPTL 420-a Non-Profit Update

***Matter of Brookdale Physicians' Dialysis Assoc., Inc. v. Dep't of Fin. of the City of N.Y.*, 41 N.Y.3d 608 (2024)**

- New York State Court of Appeals denied property tax exemption to non-profit that did not use property for exempt purpose.
- New York City Department of Finance ("DOF") revoked the exemption for a building owned by Samuel and Bertha Schulman Institute for Nursing and Rehabilitation Fund Inc. ("Schulman").
- Schulman is a non-profit entity whose mission is to fundraise in support of the Schulman and Schachne Institute for Nursing and Rehabilitation Inc. and Brookdale Hospital Medical Center.

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RPTL 420-a Non-Profit Update

***Matter of Brookdale Physicians' Dialysis Assoc., Inc. v. Dep't of Fin. of the City of N.Y.*, 41 N.Y.3d 608 (2024)**

- Schulman leased out the first floor and basement of a building it owned to Brookdale Physicians' Dialysis Associates ("Brookdale Dialysis").
- Brookdale Dialysis is a for-profit corporation whose employees are exclusively healthcare workers from Brookdale Hospital. Brookdale Dialysis provides dialysis services to the community for a fee.
- The Property was exempt from 2001 to 2013.
- Then the DOF retroactively revoked the exemption, citing Brookdale's for-profit status.
- The trial court found that DOF had not examined the property's use thoroughly enough before revoking the exemption and annulled the determination, thus reinstating the property tax exemption.

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RPTL 420-a Non-Profit Update

***Matter of Brookdale Physicians' Dialysis Assoc., Inc. v. Dep't of Fin. of the City of N.Y.*, 41 N.Y.3d 608 (2024)**

- DOF appealed and the Appellate Division affirmed, holding that the services provided by Brookdale Dialysis were "reasonably incident" to Schulman's exempt purpose of funding and supporting healthcare affiliates.
- The DOF appealed to the New York Court of Appeals, which reversed.
- The Court of Appeals structured its analysis around the general construction that while tax exemption statutes should be construed strictly against the taxpayer, where the taxing jurisdiction revokes a previously-granted exemption, it bears the burden of proving that the property was subject to taxation.
- The Court denied the exemption, reversing the Appellate Division.

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RPTL 420-a Non-Profit Update

Matter of Brookdale Physicians' Dialysis Assoc., Inc. v. Dep't of Fin. of the City of N.Y., 41 N.Y.3d 608 (2024)

- The focus of the holding was that Schulman was a fundraising organization and the exempt use had to be for that purpose. Schulman leased the property to a for-profit entity which used it solely for pecuniary gain, which is expressly prohibited under the statute.
- This was a heavily fact-specific case.
- Holding not meant to overrule other cases on RPTL 420-a.
- Other purposes that are reasonably incidental to the purpose held exempt:
  - *Matter of St. Luke's Hosp. v. Boyland*, 12 N.Y.2d 135 (1962) (non-profit hospital's lease of private apartments to hospital staff and family held exempt as "reasonably incident" to the hospital's exempt purposes) and
  - *Matter of Pace Coll. v. Boyland*, 4 N.Y.2d 528, 530 (1958) (cafeteria space for college held exempt where college had an agreement with for-profit restaurant company to operate college cafeteria and maintained supervision and control over the cafeteria operations).

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RPTL 420-a Non-Profit Update

Matter of Trustees of the Masonic Hall and Asylum Fund v. Town of Henrietta, 78 Misc.3d 1230(A) (Sup. Ct. Monroe Cnty. 2023)

- Trustees intended to develop vacant property to construct what is referred to as Masonic Care — Henrietta ,which includes (i) a Masonic Lodge with offices, conference/event spaces and facilities to serve the regional Masonic community in and around the Henrietta, NY area, (ii) a community center and amenities that will foster community and active lifestyles, (iii) a range of senior living housing and facilities and (iv) a Masonic Park and Memorial, which will honor those who have served in the armed forces (the "Project").

- Project directly connected to Petitioner's charitable purposes.

- Sought RPTL § 420-a exemption, which was denied.

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RPTL 420-a Non-Profit Update

Matter of Trustees of the Masonic Hall and Asylum Fund v. Town of Henrietta, 78 Misc.3d 1230(A) (Sup. Ct. Monroe Cnty. 2023)

- The Town's proffered basis for denial was that the Project (1) was not contemplated in good faith and (2) lacked an approved site plan and building permits. Thereafter questions raised about a lease, that was previously in effect, but not in effect as of taxable status date.

- Petitioner filed a grievance to the Board of Assessment Review.

- Town had in its possession supporting documents confirming intent to develop vacant land.
  - Schematic and design plans for development;
  - Development phases outline;
  - Meeting minutes reflecting board action approving development;
  - Sanitary pump stations plans;
  - Evaluation, program, and preliminary site development report; and
  - Sanitary pump station survey of the Property.

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RPTL 420-a Non-Profit Update

Matter of Trustees of the Masonic Hall and Asylum Fund v. Town of Henrietta, 78 Misc.3d 1230(A) (Sup. Ct. Monroe Cnty. 2023)

- Petitioner had been discussing the sewer pump station and related permits with the Town throughout this process.
- Board of Assessment Review affirmed denial, so Petitioner sued.
- During the pendency of litigation, Town issued Special Use Permit for Project, effectively mooting any argument about zoning raised.
- Supreme Court granted the exemption to Petitioner with costs and refunds of overpayments of taxes:
  - "Petitioner engaged in extensive efforts to proceed with the Project" and the application submitted contained "extensive" information supporting the intention to proceed.
- Further confirming intention to proceed, Affidavit of Petitioner showed $7 million expended for Project.
- The Town did not appeal ruling.

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Questions?

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2024 Land Use Update: Caselaw and other Developments

Municipal Law Seminar
May 14, 2025

Hodgson Russ LLP ATTORNEYS

Presented by
Edmund J. Russell III, Esq. and
Matthew B. Liponis, Esq.

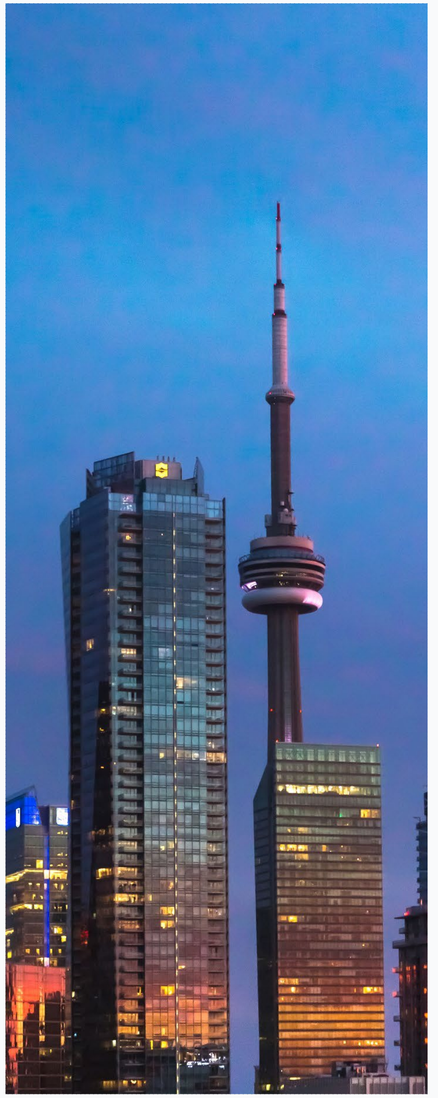
Introduction to Hodgson Russ

BROAD-RANGED, FULL SERVICE FIRM WITH DEEP CAPABILITIES

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

FREQUENTLY RECOGNIZED FOR EXCELLENCE IN PRACTICE OF LAW

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



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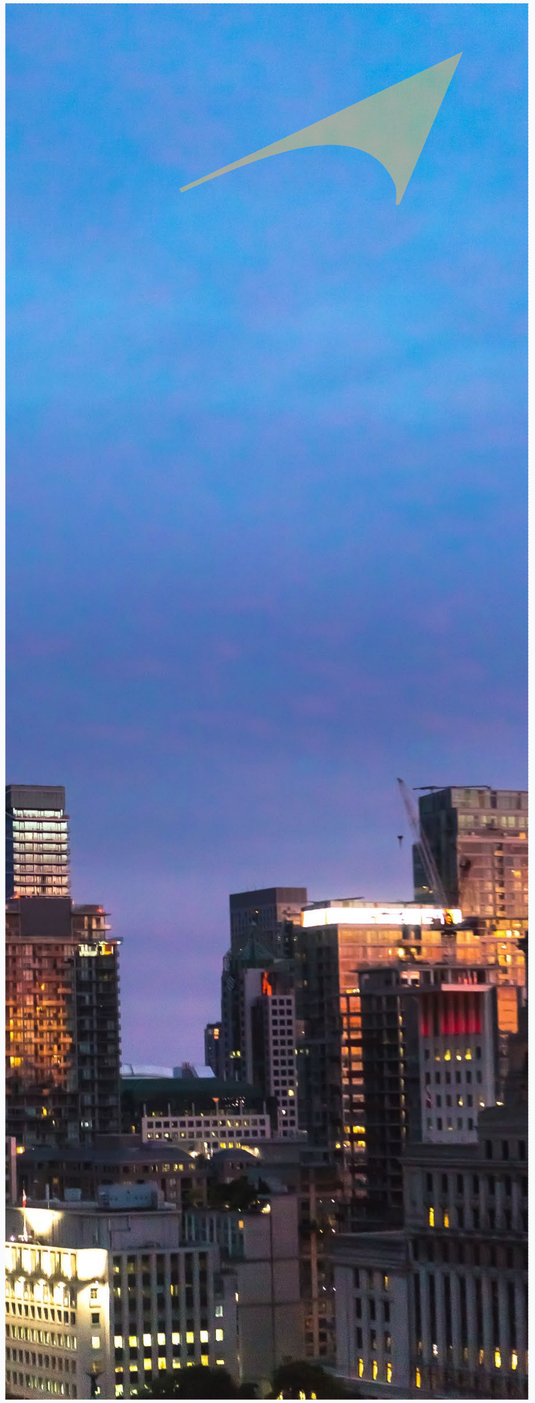

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Introduction to the Land Use Practice

PRACTICE AREAS

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

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

PROJECTS

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

CLIENTS

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

INTERNATIONAL EXPERTISE

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

Agenda

1. **SEQRA and Land-Use Basics**
   a) The SEQRA Process and Relevant Caselaw Updates

2. **Local Land-Use Approvals/Caselaw Updates**
   a) Basics of land-use approvals
   b) Public Utility Variance Standard
      - *Freepoint Solar*

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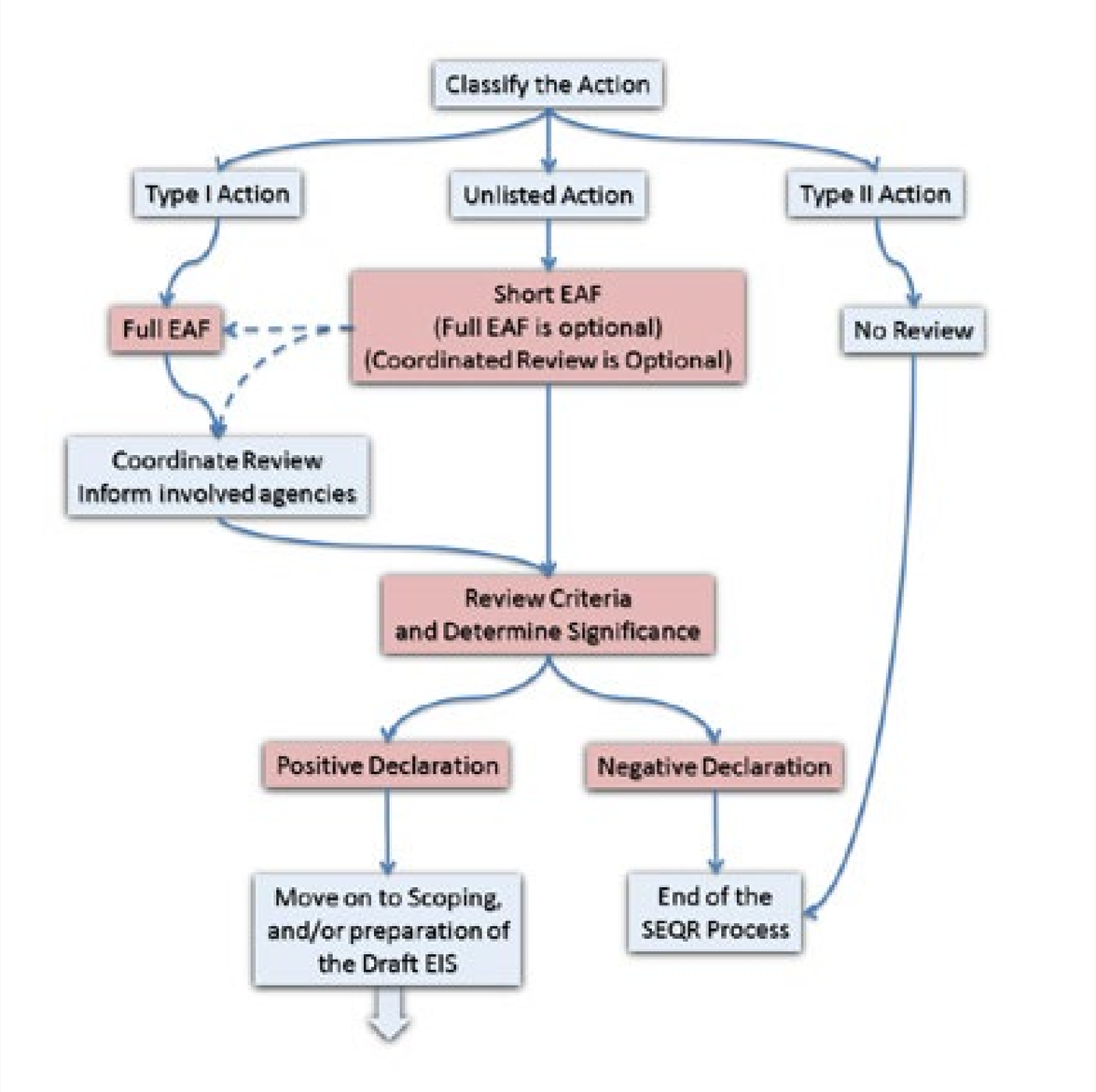
SEQRA Case Law Update



https://www.dec.ny.gov/permits/90125.html

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Classifying SEQRA Actions:

- Type I Actions – actions more likely to require an EIS than Unlisted Actions
  - Initial adoption of a zoning code
  - Changes to allowable uses
  - Granting a zoning change application

- Type II Actions – not subject to review under SEQRA
  - Adopting a moratorium on land development/construction
  - Interpretation of an existing code, rule, or regulation

- Unlisted Actions – not identified as Type I or Type II, must determine significance in the same manner as Type I

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6 NYCRR §§ 617.4, 617.5

Declarations of Significance

- Positive Declaration – action as proposed may have a significant adverse impact on the environment and that an environmental impact statement will be required. *See* 6 NYCRR 617.2(ad)

- Negative Declaration – action as proposed will not result in any significant adverse environmental impacts. Does not require preparation of an Environmental Impact Statement. *See* 6 NYCRR 617.2(z).

    - Conditioned negative declarations permissible only for Unlisted Actions. *See* 6 NYCRR 617.2(h).

Positive Declarations

- In general, positive declarations under SEQRA are not final agency actions than can be challenged in court.
- Claims are not justiciable until an agency or local board has arrived at a definitive position on an issue that inflicts actual, concrete injury.
- A limited exception to this general rule exists when:
  a) The action "impose[s] an obligation, deny a right or fix some legal relationship as a consummation of the administrative process"; and
  b) Apparent harm inflicted by the action "may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party."
- *See Matter of Gordon v. Rush*, 100 N.Y.2d 236 (2003).

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Positive Declarations

- Later, in *Ranco Sand and Stone Corp. v. Vecchio,* the Court of Appeals clarified its ruling in *Gordon*, stating that Positive Declarations are generally non-final agency decisions and are not ripe for judicial review.
- However, "where the positive declaration appears unauthorized, it may be ripe for judicial review," such as where the action is not subject to SEQRA in the first instance (because it is a Type II action), or, as in *Gordon*, a prior negative declaration by a lead agency following coordinated review is binding on other involved agencies. 27 N.Y.3d 92 (2016).
- Under *Ranco*, the cost of conducting a Draft EIS, by itself, is not sufficient to satisfy the first prong of *Gordon*.

Standing to bring a SEQRA claim

- Test for standing:
  - Establish (1) an injury-in-fact different from that of the public at large and (2) that the injury is within the zone of interests sought to be protected by SEQRA
    - More than a generalized environmental concern
    - There is no presumption of standing for a SEQRA claim based on close proximity alone
    - Injury must be of a different kind or degree than that suffered by the public at large.
    - Pure economic injuries don’t count.

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Standing to bring a SEQRA claim

- *Friends of the Shawangunks v. Town of Gardiner Plan. Bd.*, 224 A.D.3d 961 (3d Dep't 2024)
- Proposal to subdivide a 108-acre parcel along the Shawangunk Ridge and Special Use Permit to construct a new single-family dwelling and accessory structures.
- Members of local environmentalist group sued; alleging (in part) that the SEQRA negative declaration was improperly issued:
  - Why Petitioners had standing:
    - Members of environmentalist group often hiked, biked, and otherwise explored the nearby area; lived near the area; and were concerned about the effect of the development on flora, fauna, and aesthetics.

Standing to bring a SEQRA claim

- Test for standing to challenge a zoning enactment:
  - When a property owner subject to a rezoning challenges the SEQRA review, the property owner does not need to allege environmental harm
    - *E.g.*, a new use is added to a zoning district where John Smith owns property – John smith does not need to demonstrate environmental harm to challenge the municipality's SEQRA review
  - *See, e.g., Kogut v. Vill. of Chestnut Ridge*, 214 A.D.3d 808 (2d Dep't 2023) (property owners within rezoned area had standing).

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Segmentation

- A practice (intentional or unintentional) whereby a larger project is divided into separate pieces for segmented review by the authority having jurisdiction ("AHJ"). *See* 6 NYCRR 617.2(ah).
- This can result in a failure to analyze/understand cumulative impacts of the larger project and may subject individual pieces or segments to less scrutiny under SEQRA.
- For example, if a large housing development is proposed only as individual housing units for review by the AHJ (one at a time), this may result in classifying each individual house as a Type II Action, requiring no SEQRA review, when the larger project would almost certainly be considered a Type I Action.

Hard look standard and judicial review

- Substantively, an agency/board's SEQRA determination will be upheld so long as the board:
  - (1) takes a "hard look" at the relevant area of environmental concerns raised during the review; and
  - (2) provides a "reasoned elaboration" for its decision.
- What constitutes a "hard look" is often litigated.
- Courts will look at the agency's review, not to second-guess agency decisions, but to ensure the determination was not arbitrary, capricious, or unsupported by the record.
- The review is deferential.

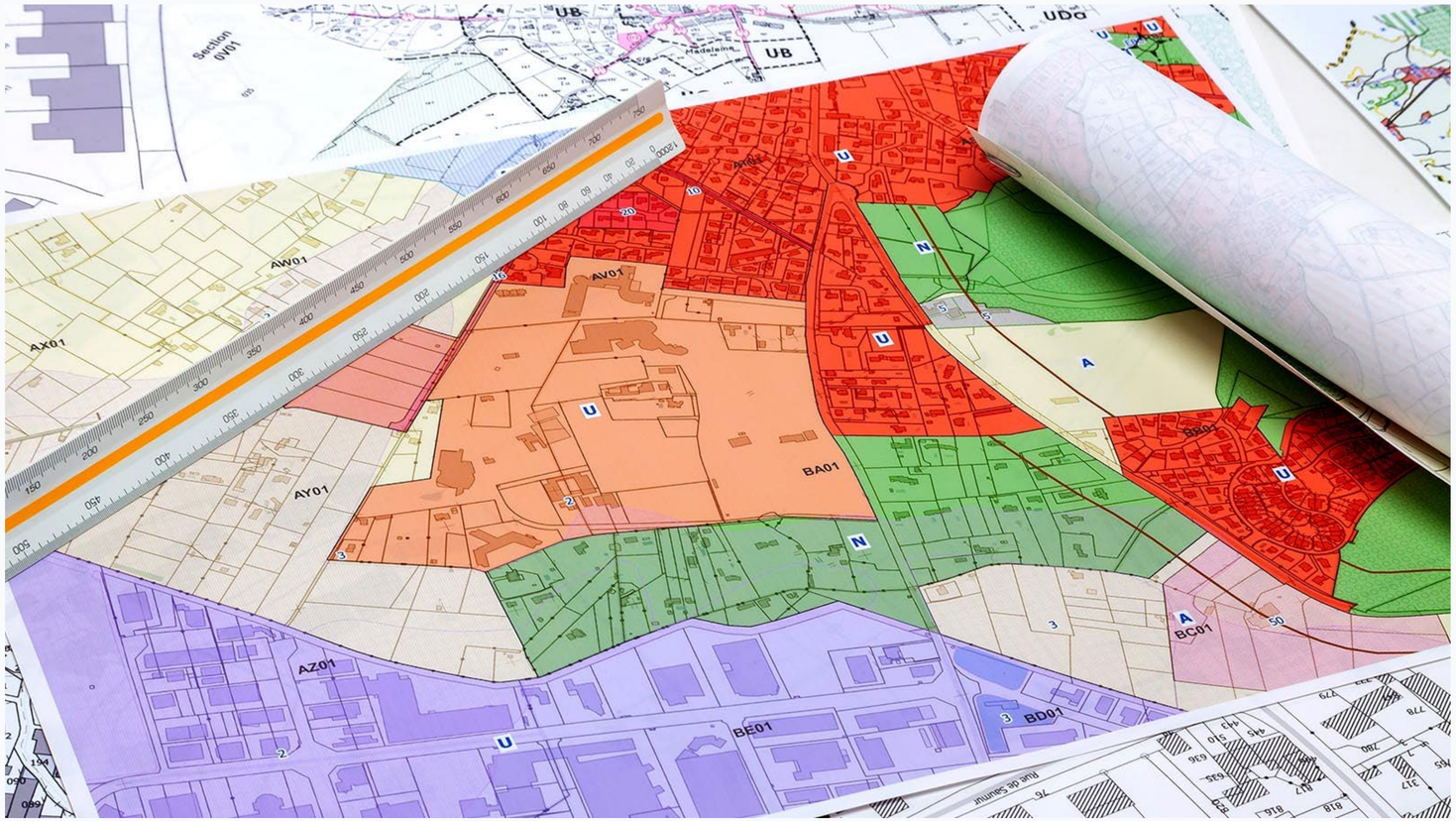
Hard look standard and judicial review

- *Clean Air Action Network of Glens Falls, Inc. v. Town of Moreau Plan. Bd.*, No. CV-23-1295, 2025 WL 554476 (N.Y. App. Div. Feb. 20, 2025)
- Town of Moreau Planning Board issued a negative declaration and site plan approval for a proposed biosolids remediation and fertilizer processing facility
- Why the court found MPD failed to take a hard look:
  - Failed to “thoroughly analyze” the project's generation of 12.7 tons of designated Hazardous Air Pollutants (“HAP”) before it issued a negative declaration
  - MPD determination that HAP emissions were mitigated was without sound basis in reason.
  - Facility would have required a State Air Permit.
  - No “reasoned elaboration” for decision.

Hard look standard and judicial review

- *Ross v. Vill. of Fayetteville,* 233 A.D.3d 1466 (3d Dep't 2024)
- Village of Fayetteville Planning Board ("VFPB") issued a negative declaration for proposed redevelopment of a vacant manufacturing facility into a grocery store
- Why the court found VFPB took a hard look:
  - VFPB offered a reasoned elaboration that the proposed grocery store redevelopment was significantly different than an earlier project on the same site, which had received a positive declaration and examined potential environmental impacts associated with the proposed grocery store redevelopment.

Land Use Case Law Update



https://arc-engineer.com/how-is-land-use-planning-done/

Specially Permitted Uses

- When a use is specially permitted in the zoning district, it represents a legislative finding that such use is appropriate in the zoning district, in harmony with the general zoning plan of the municipality, and will not present an adverse effect on the neighborhood.
- A special use permit must be granted where the board finds that the criteria set forth in the zoning law have been met.
- Representative Case: *NY Dansville I, LLC v. Village of Dansville Zoning Bd. of Appeals,* Index No. 000924-2023 (Sup. Ct. Livingston Cnty. August 29, 2024) (local zoning board ordered to issue special use permit for solar facility as proposed project fulfilled requirements set forth under local law).

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Zoning Variances

- Variances allow local municipal boards (usually a ZBA) to grant deviations from zoning requirements.
- Area Variances – deviations from dimensional requirements (setbacks, height restrictions, etc.)
- Use Variances – deviations from the type of use allowed in a particular district or area of land.

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Area Variance Standard

- Typical Five factors to consider (Statutory):
  1. Whether an undesirable change in the character of the neighborhood or a detriment to nearby properties will result.
  2. Whether the benefit sought by the applicant can be achieved by some feasible method other than an area variance.
  3. Whether the requested area variance is substantial.
  4. Whether the proposed variance will adversely impact the physical or environmental conditions in the neighborhood
  5. Whether the alleged difficulty was self-created.
- *See* N.Y.S. Town Law § 267-b(3); N.Y.S. Village Law § 7-712-b(3)(b); and N.Y.S. General City Law § 81-b(4)(b).

Area Variance Standard

- ZBA must conduct a balancing test, weighing the benefit of granting the variance against the detriment to the health, safety, and welfare of the neighborhood or community if the variance is granted.
- ZBA does not have to provide extensive justification for each factor so long as the balancing is rational.
- An applicant does not need to meet all five factors – an area variance can be granted if, on balance, the benefit to the applicant outweighs the detriment to the community.
- Representative Case: *Seaview Ass'n of Fire Island, N.Y., Inc. v. Town of Brookhaven Bd. of Zoning Appeals*, 228 A.D.3d 944 (2d Dep't 2024) (variance to allow 6-ft. fence within 2-ft. of parcel boundary properly granted).

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Use Variance Standard

- In most cases, ZBA must determine that compliance with the zoning code has caused unnecessary hardship and that the proposed use satisfies each of the following statutory criteria:
    1. The applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;
    2. The alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood;
    3. The requested use variance, if granted, will not alter the essential character of the neighborhood; and
    4. The alleged hardship has not been self-created.
- *See* N.Y.S. Town Law § 267-b(2)(b); N.Y.S. Village Law § 7-712-b(2)(b); and N.Y.S. General City Law § 81-b(3)(b).

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Standard of Review – Public Utility Variance Standard

- As confirmed by the Appellate Division for the Third Department in *Freepoint Solar, et al. v. Town of Athens ZBA*, community solar facilities are unequivocally "public utilities" in the context of variance applications.
- *Hoffman* and *Rosenberg* apply to variances requested by community solar developers.
- Standard variance criteria set forth under Town, Village, and General City Law does not apply.

Hoffman – Public Utility Variance Standard

- Nuclear cooling tower (565-ft. tall structure in a zone that prohibited structures exceeding 40 feet)
- Proposed cooling tower also caused salt water to fall onto neighboring properties, killing some plants, which made it a prohibited use
- Village of Buchanan denies variance requests, finding that the applicant (Coned) had not shown any practical difficulties requiring the variance, had not demonstrated it was the minimal variance necessary, and failed to adequately consider alternatives.
- Lawsuit, which reaches NYS Court of Appeals
- Court of Appeals

Hoffman – Public Utility Variance Standard (Cont'd)

- Coned sues
- Case reaches the NYS Court of Appeals, which establishes a different standard applicable to public utilities seeking to expand existing facilities.
- New standard focuses on "public necessity" for the facility to render safe and adequate service, among other factors, as opposed to factors like unnecessary hardship.
- Result: Public utilities are entitled to a lightened standard of review when seeking variances than other types of applicants (*i.e.*, homeowners who want a bigger house).

Hoffman – Public Utility Variance Standard (Cont'd)

- Standard requires developers to:
  1. Show "that [siting a new facility or] modification [of an existing facility] is a public necessity in that it is required to render safe and adequate service."
  2. Show "compelling reasons, economic or otherwise, which made it more feasible to seek a use variance for [the project] than to use alternatives sites."
- Additionally, "where the intrusion or burden on the community is minimal, the showing required by the utility should be correspondingly reduced."

Expansion of *Hoffman - Rosenberg*

- Cell tower case involving the siting of a new cell tower (not an expansion of an existing facility, as was the case in *Hoffman*).
- Court of Appeals expands the definition of public utility to various types of companies that provide essential public services, so long as such facilities are subject to some measure of public regulation and there are logistical problems with providing the service in question (*i.e.*, the utility must be wired, piped, etc. and must be maintained at a consistent level).

Freepoint Solar (History)

- Recent Third Department Case originating in Greene County, NY
- Solar facility sought a use variance in 2021
- ZBA initially failed to apply *Hoffman's* Public Utility Variance Standard to the application and denies the application
- Solar company sues arguing the ZBA applied the wrong standard
- Supreme Court agrees; remands and orders ZBA to apply *Hoffman*

Freepoint Solar (History) (Cont'd)

- ZBA denies the application (again), indicating in its decision that the Freepoint failed to demonstrate that there was a "public necessity" for the project because (essentially):
  - The town already has electricity; and
  - The statewide goals under the CLCPA for solar (6 gigawatts) had already been met or were forecasted to be met based on facilities under contract or development (not true – state had updated its goal to 10 gigawatts).

Freepoint Solar (History) (Cont'd)

- ZBA's denial also indicated Freepoint had failed to demonstrate that it would be "impossible" to develop the same facility in a location where zoning would permit (and no such use variance would be required).
- Underlying record and oral arguments show that the ZBA demanded Freepoint to show that if it gave up its position in the interconnection queue and therefore freed up capacity on the line, that the facility could not be constructed on a parcel where solar was allowed under the zoning code.

Freepoint Solar (History) (Cont'd)

- Greene County Supreme Court agrees with the ZBA and upholds the variance denial.
- Freepoint appeals to the Appellate Division for the Third Department

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Freepoint Solar Decision

- Consistent with an *amicus* brief filed by the NYSOAG on behalf of the N.Y.S. Public Service Commission, the Third Department struck down the Supreme Court's decision and sided with the solar developer, ordering that the use variance be issued.

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Freepoint Solar - Lessons and Impact

- Community solar facilities are unequivocally “public utilities” entitled to review of variance applications under *Hoffman*.
- *Freepoint* applies across each of the state’s 62 counties, leaving no question that *Hoffman* is binding precedent when community solar developers seek variances.

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Freepoint Solar - Lessons and Impact

- "Public necessity" should be examined from both a local and broader perspective, accounting for:
  - Local benefits due to factors like upgrades to utility wires, improved grid resilience and reliability, etc.
  - The State's climate goals under the CLCPA
  - Impacts of climate change

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Employee Evaluation & Discipline: Know the Procedures and Best Practices for Success

Municipal Law Seminar
May 14, 2025

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Presented by
Peter C. Godfrey and Jeffrey F. Swiatek

Conducting Effective Employee Evaluations

Why Are Evaluations Important?

- Performance evaluations are an important **communication** tool.
- Engage employees in open, honest, and constructive dialogue.
- Allows an agency to:
  - Provide critical feedback;
  - Acknowledge good performance;
  - Set expectations for future job performance;
  - Rehabilitate and remediate poor performance; and
  - Identify issues that may lead to possible discipline or removal.
- Ongoing performance discussions can assist in avoiding serious problems in the future.

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Conducting Effective Employee Evaluations

Evaluations Criteria and Procedures

- The New York Public Employment Relations Board has established the following general framework with regard to the overlap of collective bargaining and employee evaluations:
  - The ***standards*** and/or ***criteria*** for evaluations are non-mandatory subjects of bargaining, but
  - Evaluation ***procedures*** are mandatory subjects.

(*e.g.*, Roswell Park, 36 PERB ¶ 4518 [2003]; County of Nassau, 35 PERB ¶ 4566 [2002])

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Conducting Effective Employee Evaluations

Best Practices for Evaluations

- Do not shy away from criticism or directly addressing poor/deficient performance.
- Supplement checklist observations & evaluations with brief narrative paragraphs to be used in citing specific criticisms of performance.
- Take advantage of informal opportunities to observe, evaluate, advise, and assist employees. A formal improvement plan should not be the first step toward remediating performance.
- Effectively use the probationary period.
- Document, document, document!

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Conducting Effective Employee Evaluations

Best Practices for Evaluations

- Clearly outline all areas of dissatisfaction.
- Make it clear that progress will be required by a certain date and how that progress will be measured.
- Be thorough, specific, and direct.
- Prepare discussion points and recommendations prior to post-observations and evaluations.
- Observe and be aware of the timelines and other restrictions specified in the relevant CBA or by law.
- Reference applicable policies/orders/standards to the extent applicable.

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Conducting Effective Employee Evaluations

Best Practices for Evaluations

- Monitor and follow through on performance problems and corrective measures.
- Remain objective and seek outside counsel if needed.
- Supervise and evaluate aggressively during the early years of employment. The administration should be certain that inadequacies in performance are remedied before permanent status is considered.
- Where inadequacies of performance are identified, evaluate consistently and frequently until the evidence is conclusive, irrefutable and overwhelming.
- Be sure to observe any contractual procedures and/or timelines for evaluations.

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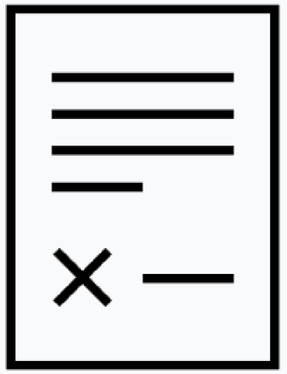
Conducting Effective Employee Evaluations

Documenting Performance

- Focus on facts and be clear about conclusions (including basis for credibility judgements).
- Avoid inflammatory words.
- Directives should be succinct and pointed.
- Personalize the memoranda.
- Do not inject personal viewpoints.
- Disinterested review.
- Destroy drafts.
- Sign and date.



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Conducting Effective Employee Evaluations

Documenting Misconduct

- Hand-deliver document(s) to the employee.
- Obtain a written acknowledgment.
  - If none – note circumstances, including the refusal to sign by the employee.
- Offer the employee an opportunity to respond.
- Place relevant documentation in personnel file.

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Conducting Effective Employee Evaluations

Counseling Memoranda

COUNSELING ≠ DISCIPLINE

- Distinction between "admonitions that are critical of performance" and "disciplinary determinations of a punitive nature."
- A counseling letter is an administrative action which is not disciplinary in nature, *unless* the letter contains written criticism constituting a reprimand or otherwise punitive.
- Because counseling letters are not discipline, they **should not** include a penalty (although they can include remedial measures).
- Except for the most egregious conduct, management should first attempt to deal with performance shortcomings early through evaluation and counseling.

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Conducting Effective Employee Evaluations

Counseling Memoranda: Factors of Analysis

- Factors used to determine whether a counseling letter will be viewed as a critical of performance or a disciplinary determination of a punitive nature (reprimand):
  - Is the letter directed toward an improvement in performance or a reprimand for prior misconduct?
  - The severity of the misconduct and the admonition/reprimand.
  - Is the letter from the immediate supervisor or from the governing board?
  - Does the letter use the word reprimand?
  - Does the letter use accusatory language of formal charges in describing the conduct at issue?

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Conducting Effective Employee Evaluations

Counseling Memoranda: Components

- A counseling letter should include:
  - A summary of the conduct that led to the issuance of the letter;
  - The key results of the investigation or review of the matter;
  - The employee's response;
  - Disposition of the issue;
  - Instruction to the employee to abstain from similar conduct in the future, or to take certain conduct in the future;
  - A warning that formal disciplinary action may be taken in the event of other violations or misconduct.

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Disciplinary Procedures

Civil Service Law: Due Process Protections

- Section 75 of the NYS Civil Service Law protects certain public employees from being penalized or removed from their position without due process.
  - "shall not be removed or otherwise subjected to any disciplinary penalty … except for **incompetency** or **misconduct** shown after a hearing upon stated charges."
- Relevant Statute of Limitations
  - No more than 18 months after the occurrence of the misconduct except where the misconduct complained of and described in the charges would constitute a crime.
- Right to representation at a disciplinary meeting (prior to any hearing).
- Right to notice of the charges and to respond.
- Right to a hearing (appointing officer or designee acts as hearing officer).
- Burden of Proof (on the employer).

N.Y. Civ. Serv. Law § 75(1)(a)-(e)

Disciplinary Procedures

Civil Service Law: Disciplinary Consequences

- Reprimand;
- Monetary fine (not to exceed $100 deducted from employee's wages);
- Suspension without pay (not to exceed 2 months);
- Demotion in grade and title; or
- Dismissal.

If the employee is found not guilty of the charges, he/she must be restored to his/her original position with full back pay and benefits for any period of suspension (less any unemployment).

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Disciplinary Procedures

Employee Discipline – Negotiated Revisions to Section 75

- Civil Service Law § 76[4] authorizes public employers and unions to negotiate modifications and alternatives to Section 75 disciplinary procedures.
- Under the Taylor Law (Article 14 of the Civil Service Law), public employees and unions are authorized to negotiate disciplinary standards and procedures, which may supplant statutory protections or modify at-will status. *Grippo v. Martin*, 257 A.D.2d 952 (3d Dept. 1999).

Disciplinary Procedures

Employee Discipline – Negotiated Revisions to Section 75

- Carefully define “management rights” and termination standards, to protect ability to set expectations and hold employees accountable.
- Consider pros and cons of statutory procedure, *e.g.*, Section 75, versus negotiated procedure.
- If using a negotiated procedure, consider options such as timing, appointment of arbitrator or other decision maker, finality of decisions.
- Establish a clear procedural trajectory for discipline with clear time frames.

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Disciplinary Procedures

Employee Discipline – Other Statutory Disciplinary Procedures for Police

- Town Law § 155: The Court of Appeals has affirmed lower court decisions finding that town boards may adopt investigative and disciplinary procedures, which supercede any such collectively-bargaining provisions (*Town of Wallkill v. CSEA*, 19 NY3d 1066 [2012]).
- Section 155 authorizes town boards to adopt "rules and regulations for the examination, hearing, investigation and determination of charges" against members of the police department.
- Section 155 contains a number of requirements for such procedures, including:
  - Written charges and a detailed hearing process; and
  - A 60-day statute of limitations, measured from when "the facts upon which such charges are based are known to the town board."
- Village Law § 8-804 essentially tracks Town Law § 155, although no court has yet explicitly extended the *Wallkill* analysis to villages.

Disciplinary Procedures

At-Will Employees

- If no protections apply under law, policy or contract (including because the employee is probationary or provisional), the "at will" employment principles apply.
  - An "at-will" employee may be disciplined or discharged for any **legal, non-discriminatory reason**.
- Must be a **rational basis** for the discharge (i.e., not done in "bad faith"). A discharge that is arbitrary, capricious, or lacks a rational basis is subject to a review by the courts in a CPLR Article 78 proceeding.
- Always assess the risk of a discrimination and/or retaliation claim before taking action. For example:
  - Is the employee currently on job protected leave?
  - Has the employee recently engaged in protected activity?
  - Are the employee's pension or retiree health benefits about to vest?

Taking Appropriate Disciplinary Action

Employee Discipline

Good practices:

- Focus on the facts
- Let the employee tell his/her side of the story ("Loudermill" rights)
- Assess the risk (legal review of protected status, etc.)
- Remember "Garrity" and union representation

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Taking Appropriate Disciplinary Action

The Seven Tests of Just Cause

1. **Reasonable rule or work order that was broken by employee?**
   - Ensure work rules (whether by policy manual, general orders or otherwise) are comprehensive but sufficiently detailed and legal.
   - Applied in a consistent and unbiased way.

2. **Did Employee receive prior notice of rule?**
   - *Prior notice* may not be necessary in cases of serious misconduct

3. **Was there a sufficient investigation?**
   - Have you adequately pursued all relevant information to establish wrongdoing or unacceptable performance?

4. **Was the investigation fair and objective?**
   - Have you given the employee a chance to appear with a representative, hear and respond to the allegations, and tell his side of the story?

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Taking Appropriate Disciplinary Action

The Seven Tests of Just Cause

5. Is the proof sufficient?

- Is the proof of misconduct substantial and clearly supported by the evidence you gathered?

6. Was this employee treated equally?

- Is there a “disparate treatment” defense?

7. Was the disciplinary action appropriate given the totality of circumstances?

- Is the discipline you propose to take reasonably related to the seriousness of the problem?
- Is it reasonably related to the employee's record (length of service and overall performance)?

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Taking Appropriate Disciplinary Action

Employee Discipline – Other Protections

- Discrimination protections (Title VII, NYSHRL, etc.)
- Leave entitlements (ADA, FMLA, GML 207-c, etc.)
- Constitutional considerations (free speech, search/seizure, etc.)
- Statutory job protection (CSL 75, Town Law 155, etc.)
- Whistleblower and Anti-Retaliation protections
- Contractual considerations (“just cause”/arbitration/discipline and evaluation procedures, etc.)
- Employee relations considerations

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Taking Appropriate Disciplinary Action

"Right to Remain Silent"

- Civil Service employees are required to answer questions truthfully and completely or can face termination for refusing to so answer
  - (*Shales v. Leach*, 119 A.D. 2d 990 (4th Dept. 1986); and *Matt v. Larocca*, 71 N.Y. 2d 154, 1987)

- "*Garrity Rights*" – Respects constitutional right to remain silent in criminal context, but protects the right of employer to compel cooperation with investigation in the employment context.

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Representation

Representation in Investigations

- Does the right to union representation also include the right to union representation during questioning?
  - Generally yes, upon an employee's demand, at the time of questioning if it reasonably appears that the employee may be the subject of potential disciplinary action.
  - Commonly referred to as "*Weingarten* rights" after a 1975 U.S. Supreme Court decision on *NLRB v. Weingarten*.
- An employee who requests representation under such circumstances must be afforded reasonable time to obtain it.

Representation

Representation in Investigations

- Be sure to check the collective bargaining agreement!
- Many CBAs have language that applies in some measure to the investigative and disciplinary process.
- Violation of language on notice, representation and other procedures may lead to the exclusion of any information obtained, or nullification of the ultimate discipline.
- Employee may not have the right to demand which representative will be present.

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Representation

Representation in Investigations

- This right attaches when regardless of the initial nature of the meeting, *e.g.*, where the employee is asked whether he/she engaged in alleged "misconduct," converting the meeting into one to which representation rights attach.
- The union *is not* obligated under the Taylor Law to provide representation to a non-member during questioning by the district.
- In addition, employees subject to Civil Service Law Section 75 protections are entitled to advance written notice of their right to union representation prior to questioning by the district, where it reasonably appears the employee may be subject to discipline.

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Last Chance and Other Disciplinary Agreements

Last Chance Agreements (LCAs)

- LCA: A written agreement giving an employee who has been accused of engaging in some kind of serious misconduct, one last chance to keep their job.
  - Should clearly set forth:
    - the employee's employment problems;
    - the expectations for continued employment; and
    - the ramifications for the employee's failure to follow through.
  - Can be negotiated before after charges are preferred against an employee.
  - **Advantage**: Even if an LCA requires compliances with grievance procedures, the scope of review will be limited to whether the employee engaged in the alleged misconduct or other objectionable behavior.
    - An arbitrator will not review the reasonableness or proportionality of the penalty if set in advance as part of a LCA.
  - **Caution**: Employee's waiver of statutory protections must be "clear" and "voluntary and noncoerced.

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Employee Discipline - Free Speech

First Amendment Protections

- "**Congress shall make no law** respecting an establishment of religion, or **prohibiting the free exercise thereof; or abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

- The First Amendment only restricts the **government** from restricting speech or penalizing an individual for speech.

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Employee Discipline - Free Speech

First Amendment Protections

- Public sector employees have greater, but still limited, First Amendment protections in the workplace. Certain employees such as police officers are generally afforded a lower level of protection given the quasi-military nature of a police department and the nature of the work performed.
- The First Amendment protects public employees' right to free speech **only** when they speak as **private citizens** on **matters of public concern**.
  - "If public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S. 410 (2006).
  - Speech concerning purely private matters, e.g., personal gripes is not protected by the Constitution. Many political issues, however, are matters of public concern.

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Employee Discipline - Free Speech

First Amendment Protections

- *Locurto v. Giuliani*, 447 F.3d 159 (2d Cir. 2006): Discharge of employees from their positions in the NYPD and the FDNY in retaliation for their participation in a Labor Day parade, on a float that featured mocking stereotypes of African-Americans, was upheld on the basis that the City's interests in fostering a trusting relationship between the departments and the minority community outweighed the employees' right to self-expression.

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Employee Discipline - Absenteeism

FMLA Applicability

- The FMLA generally requires employers with 50 or more employees to provide eligible employees up to 12 weeks of leave per 12-month period.
- Eligible employees are those who:
  - Have been employed by the employer for at least 12 months;
  - Have worked at least 1,250 hours for the employer during the 12-month period preceding the leave; and
  - Work in a location where the employer has 50 or more employees within a 75-mile radius.
    - For remote employees, employers must consider the physical office location to which the remote employee reports and from which he or she receives work as the work location.
    - If a remote employee's reporting office employs 50 or more employees within a 75-mile radius (and he or she otherwise meets the eligibility requirements), the remote employee would be eligible for FMLA leave.

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Employee Discipline - Absenteeism

Qualifying Reasons for Leave

- Eligible employees may take FMLA leave for any of the qualifying reasons:
  - Birth of a child or placement of a child with the employee for adoption or foster care, to care for the child within one year of birth or placement.
  - To care for a family member (i.e., child, spouse, or parent) who has a serious health condition.
  - For an employee's serious health condition rendering the employee unable to perform the functions of his or her position.
  - Qualified exigencies resulting from a covered servicemember called to duty in the Armed Forces.
  - To care for a covered servicemember who is injured or becomes ill while on covered active duty.

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Employee Discipline - Absenteeism

Intermittent Leave

- Leave can be taken intermittently where it is occasioned by a serious health condition, a covered servicemember's injury or illness, or a qualifying exigency.
  - Intermittent includes (a) leave taken in separate blocks of time, or (b) on a reduced schedule basis.
  - Intermittent leave may be taken in the smallest increment of time the employer allows for the use of other forms of leave, as long as no more than one (1) hour.
  - Intermittent leave can be taken for birth, placement, or bonding, but only if the employer and employee agree.

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Employee Discipline - Absenteeism

Reasonable Accommodations Under the ADA

- The Americans with Disabilities Act may require an accommodation, defined as a modification or adjustment to the job application process, the work environment, or the manner or circumstance under which the position is customarily performed that enable a qualified individual with a disability to perform the essential functions of that position.
  - A **reasonable** accommodation is one that "seems reasonable on its face, i.e., ordinarily or in the run of cases."
  - Examples of potentially reasonable accommodations include modified work schedule, extra break time, change in workspace location, exceptions from certain policies, job restructuring, reassignment, and **unpaid leave**.

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Employee Discipline - Absenteeism

Applicability Under the NYS Human Rights Law

- Under the HRL, disability means “a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.”
  - Also includes having a record of such impairment or a condition regarded by others as such an impairment.
  - The HRL’s definition of “disability” is broader than under the ADA; thus, the HRL covers more conditions as compared to the ADA.

Employee Discipline - Absenteeism

The Interactive Process

- Generally, it is the employee's responsibility to inform the employer that an accommodation is needed.
- The employer is entitled to know that the individual has a covered disability and that he or she needs an accommodation because of the disability.
- The employer should engage in an "interactive process" with the employee to obtain relevant information and explore potential accommodations.
- Ultimately, the employer has the right to choose from among multiple reasonable accommodations, if the chosen accommodation is effective.

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Employee Discipline - Absenteeism

Undue Hardship Defense

- An employer has a defense to providing a reasonable accommodation if the accommodation would impose an “undue hardship”
- “Undue hardship” is defined as “significant difficulty or expense incurred” by the employer. Factors considered include:
  - The nature and net cost of the accommodation, taking into consideration the availability of tax credits and deductions, and/or outside funding;
  - The overall financial resources of the facility or facilities, the number of persons employed at such facility, and the effect on expenses and resources;
  - The overall financial resources of the employer, the overall size of its business, the number of its employees, and the number, type and location of its facilities;
  - The type of operation or operations of the employer, including the composition, structure and functions of the workforce, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the employer; and
  - The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

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Update on New York State Real Property Tax Law and Legislation

Municipal Law Seminar
May 14, 2025

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Presented by:
Michael B. Risman

Update on New York State Real Property Tax Case Law and Legislation

- **Case Law Updates**
  - Surplus money in public foreclosure cannot be retained by public entity and must be returned to owner and/or lienor.
    - ***Tyler v. Hennepin***, 598 U.S. 631 (2023).
    - ***Polizzi v. County of Schoharie***, 720 F. Supp.3d 141 (NDNY 2024)
      - Retroactive claim for surplus monies in prior public foreclosure allowed to be pursued by court.
      - Will there be individual or class-action claims relating to prior foreclosure proceedings which did not have surplus money?

Update on New York State Real Property Tax Case Law and Legislation

3. ***Sikorsky v. City of Newburgh,*** (2d Cir. 2025) — Federal claim alleging sale without surplus money violated takings clause of U.S. Constitution allowed to proceed.
4. ***Jones v. Flowers,*** 547 U.S. 220 (2006) — Prior public foreclosure case requiring additional notice to interested parties.
5. NYS recently enacted RPTL legislation codifying requirements for surplus money.
6. ***County of Westchester v. City of Rye,*** 2025 WL 1119103 (2d Dep't 2025) — Rye Playland Amusement Park owned by County held exempt from real property taxes even though 30-year management agreement with hedge fund making profit entered into by County.

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Update on New York State Real Property Tax Case Law and Legislation

7. **RPTL § 406** — Real property owned by a municipal corporation within its boundaries and used exclusively for exempt purposes shall be exempt from real property taxes.

B. ***Town of Irondequoit v. County of Monroe****,* 36 N.Y.3d 177 (2020) — Unpaid demolition costs assessed against the real property must be paid by the County to the municipality when the County makes the municipality whole for taxes levied pursuant to RPTL § 936.

C. ***Robins v. Town of Hague***, 2025 N.Y. Slip Op (4/10/25) (3d Dep't 2025) — Arms-length sale of residential property 18 months before taxable status date held binding in tax assessment case warranting summary judgment to the petitioner.

II. Summary of 2024 Real Property Tax Legislation

- **Exemption Administration**
  - **Agricultural assessments; Cannabis as a crop**
    - ☐ **Chapter 605 (A. 1234)**
    - ● **Agriculture and Markets Law § 301(2)(m)**

    Chapter 605 expands the definition of "crops, livestock and livestock products" for purposes of the agricultural assessment program to include cannabis. As a result, sales of cannabis may count towards the "gross sales" threshold (generally $10,000) required for agricultural operation to qualify for the agricultural exemption. Upon signing this measure into law, the Governor issued an Approval Message (#47).

Update on New York State Real Property Tax Case Law and Legislation

2. Climate Change property tax relief act

☐ Chapter 673 (S.7515-a)

● RPTL § 467-n

Chapter 673 generally authorizes a local option tax relief for certain properties that have been damaged by natural or human-caused disasters, retroactive to January 1, 2020. Upon signing this measure into law, the Governor issued an Approval Message (# 96). Amendments to this legislation are expected, so a description of the program will be provided at a later time.

Update on New York State Real Property Tax Case Law and Legislation

3. Housing; Rental multiple dwellings

☐ Chapter 56 (S.8306-c), Part EE

● RPTL §§ 421-p and 421-pp

Chapter 56 (S.8306-c) , Part EE, enacts two local option exemption programs to incentivize the development of affordable rental housing outside New York City. Both programs only apply in a city, town, or village that has adopted a local law providing an exemption from taxation and special ad valorem levies for the construction conversion of rental multiple dwellings located with a designated benefit area defined by local. Law. If a city, town, or village authorizes the exemption, a county or school district in which the designated benefit area is located may also authorize the exemption.

Update on New York State Real Property Tax Case Law and Legislation

The primary eligibility requirements for the rental housing incentive program authorized by new RPTL § 421-p are: (a) the property must contain 10 or more dwelling units that are all rented for residential purposes; (b) at least 25% of the units must meet the applicable affordability criteria; (c) any new construction must take place on vacant, predominantly vacant or under-utilized land, iron land containing a structure that is non-conforming, substandard, unsound or unsanitary; and (d) building service employees must receive the applicable prevailing wage (unless an exception applies). Eligible property is wholly exempt while under construction, for up to three years. After that, it is partially exempt for another 25 years, with the exemption starting at 96% and decreasing by 4% each year thereafter.

Update on New York State Real Property Tax Case Law and Legislation

However, taxes must be paid during the exemption period in an amount at least equal to the taxes paid on such land and any improvements thereon during the tax year before the exemption began. Property may not receive any other exemption while receiving this exemption. (Note that this RPTL § 421-p is distinct from the RPTL § 421-p enacted by Chapter 56, Part GG, which is discussed below.)

The second rental housing incentive program, which is authorized by new RPTL § 421-pp, is broadly similar to the § 421-p program described above, except that: (a) this program applies where all (*i.e.,* 100%) of the units meet the applicable affordability requirements; (b) the post-construction exemption in these cases lasts for 30 years, with the taxes payable during that period being specified by local law (subject to a cap of 10% of the shelter rent); and (c) building service workers in these properties need not be paid the prevailing wage.

Update on New York State Real Property Tax Case Law and Legislation

4. Residential capital improvements; Carbon emissions
☐ Chapter 590 (S.9688) ● RPTL § 421-q
Chapter 590 gives counties, cities, towns, villages and school districts the option to provide an exemption to improvements to owner-occupied residential property for two or fewer families that reduce greenhouse gas emissions. The terms of the exemption is limited to 20 years, during which eligible improvements would be 100% exempt for 10 years, and then partially exempt for the following ten years, with the exemption percentages declining by 10% a year (*e.g.,* 90% in year 11, 80% in year 12, *etc*.).

Update on New York State Real Property Tax Case Law and Legislation

Eligible improvements include the replacement, repair, or installation of new heating, cooling, or hot water systems, the installation of solar, energy storage, and other mechanisms to offset use of energy from the electrical grid the replacement or installation of insulation, the replacement of installation of thermostats, the installation of energy-efficient appliances, fixtures, or lighting, and the repair, replacement, or modification of electrical systems and associated wiring. A municipality that opts to offer the exemption may further opt to reduce the exemption percentages and/or limit or expand the types of eligible improvements. The exemption ends if the property ceases to be used primarily for residential purposes or is transferred to someone other than the owner's heir or distributee.

Update on New York State Real Property Tax Case Law and Legislation

5. Volunteer firefighters and ambulance workers; Neighboring municipalities

☐ Chapter 372 (S.2862-a)

● RPTL § 466-1

Chapter 372 modifies the residency requirements of the exemptions for volunteer firefighters and ambulance workers under RPTL § 466-a through 466-k by giving a city, village, town, county and school district that offers the exemption the option to extend the exemption to volunteer firefighters and ambulance workers who provide volunteer services to a neighboring city, village, town, county or school district.

B.Tax Collection and Enforcement

- **Tax foreclosure surplus**
  - ☐ **Chapter 55 (A.8805-c), Part BB**
  - ● **RPTL article 11 and §§ 467, 922**

  Chapter 55, Part BB, revises the State's property tax enforcement laws to generally provide that when tax-delinquent property is sold, any excess proceeds shall be returned to the former owner or owners, and where appropriate, to lienors. Previously, most tax districts had retained surplus, but that practice was rendered untenable by a recent decision of the United States Supreme Court, *Tyler v. Hennepin County, Minnesota,* 598 U.S. 631 (2023).

Update on New York State Real Property Tax Case Law and Legislation

The legislation also attempts to provide greater protections to homeowners, in some cases by requiring new information to be placed on tax bills or related notices. For example, the statement that goes on tax bills to advise taxpayers of the existence of the senior citizens exemption has been reworded to advise them of the existence of the disability and veterans' exemptions as well. The same change has also been made to the "second notice" that is sent 30 days before taxable status date (*see* RPTL § 467(4) as amended by L.2022, Chap. 738). In addition, the new law requires information about the availability of credit counseling to appear on various post-billing notices, such as notices of arrears.

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What to do When Your Project Changes: Tariffs, Scope, Grants and More

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Presented By
John A. Alessi, Edmund J. Russell, III, and Benjamin B. Clark

Municipal Projects – Where to Start

- What is your project?
- Different municipalities have different requirements for authorizing a project.
- Moreover, different projects have different statutory requirements for authorization.
- Towns – subject to permissive referendum. Must publish the notice in the official paper. This notice must also be posted on the Town's sign board.
- Villages – also subject to permissive referendum. Must publish the notice in the official paper. This notice must also be posted in at least 6 public places and at each polling place (a polling place can count as a conspicuous place).
- Cities – able to authorize projects effective immediately.

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Municipal Projects – Continued

- Town Water and Sewer Projects – governed by Town Law 202-b.
- This section of law requires a public hearing be held prior to the adoption of a bond resolution.
- An order calling public hearing must be adopted to call such public hearing.
- The publication of the order must be made within 10 days of its adoption.
- The public hearing must be held no less than 10, but no more than 20 days after the publication of the order.
- After the public hearing, the resolution and order after public hearing, along with the bond resolution can be adopted (on the same day of the public hearing).

Town Sewer and Water Projects Continued

- A map, plan, and report must be drafted by a licensed engineer prior to the commencement of the project.
- When amending a 202-b proceeding, the entire process must start over again. The same is true for proceedings creating, or extending a district (including re-acquiring OSC approval, if required by law).
- Permissive referendum requirements do not apply to 202-b proceedings because of the public hearing.
- 202-b does not apply to non-capital improvements projects. For example, if a Town is acquiring a truck for sewer purposes. However, if that truck will be paid off over a period of time that exceeds 5 years, then the bond resolution will be subject to permissive referendum.

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Bond Resolutions – The Basics

- What does a bond resolution do?
- Authorizes the municipality to borrow money for a particular project. Many entities require a bond resolution be adopted before grant money is awarded.
- Generally, consists of the project's (1) maximum cost, (2) description, (3) plan of financing, (4) pledge of full faith and credit, (5) declaration of official intent for reimbursement, and (6) delegation of authority to issues bond anticipation notes.

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Bond Resolutions – To Amend, or Not to Amend?

- When does a bond resolution need to be amended?
- Whenever the crucial elements of the project have been altered.
- The primary reasons for amending a bond resolution include (1) a change in the maximum cost of the project and (2) a change in the scope of the project.

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Amending the Maximum Cost

- More complicated than it first appears.
- First, if the cost of the project decreases, generally, a community is not required to amend the bond resolution; however, it may do so.
- In fact, it is beneficial to have a higher maximum cost because it allows for further flexibility, and you are not obligated to borrow the full amount authorized.
- However, when the maximum cost of the project increases, the bond resolution must be amended.
- A tricky scenario is when new grant funds become available and increase the maximum cost of the project. While the scope of the project may be the same, the bond resolution must be amended to reflect the alteration to the maximum cost and the corresponding plan of financing.

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What Causes Increases in Maximum Cost?

- Higher than expected bids. We have seen bids go up due to the new Buffalo Bills Stadium taking up so many contractors.
- Increase in material costs as time goes on.
- Increase in labor costs.
- Tariffs.
- Unexpected conditions at the project site (may also modify the scope of the project).

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Changes in the Scope of the Project

- What is the project's scope?
- The scope is the work being done as part of the project.
- If there is a map, plan, and report for the project, the scope described within the bond resolution will mirror it.
- Can be as simple as "acquisition of a truck and associated equipment and apparatus" or as complex as describing an entire pump station reconstruction.

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Amending the Scope

- When does a change in scope necessitate an amendment?
- When the scope of the project increases to encompass more work, the bond resolution must be amended accordingly.
- What if the scope decreases?
- An amendment is still necessary if the scope of the project has been materially altered.
- For example, if a project goes from the complete reconstruction of a sewer treatment plant to the mere replacement of a single piece of equipment an amending bond resolution will be required.

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Summary

- Municipal projects have many moving parts that must synthesize for the project to come to fruition.
- Please reach out to bond counsel before the project commences and keep us informed of any updates to the project as it progresses.
- The adoption, and potential amendment, of the bond resolution is a critical step that must be completed before a project is commenced or altered.

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Hot Topics in Constitutional Law

Municipal Law Seminar
May 14, 2025

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Presented by:
Henry A. Zomerfeld, Esq.

Overview

- *Lindke v. Freed:* First Amendment and social media with local officials.
- *Wallace v. Grand Island*: Short-term rental regulations and takings.
- *Sikorsky v. City of Newburgh*: Tax foreclosure surplus and takings.

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Lindke v. Freed, 601 U.S. 187 (2024)

- City manager who blocked a community member's comments from his Facebook page.
- Freed was the Port Huron City Manager. Prior to becoming city manager, he had a Facebook page which listed him as "Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI."
- Freed continued to operate his Facebook page himself and continued to post content about his personal life.
- But he also posted information related to his job, such as:
  - Highlighting communications from other city officials;
  - Solicited feedback on issues of public concern.

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Lindke v. Freed, 601 U.S. 187 (2024)

- After the COVID-19 pandemic began, Freed posted about it. Some posts were personal, and some contained information related to his job.
- Facebook user Kevin Lindke commented on some of Freed's posts by expressing his displeasure with the city's approach to the pandemic.
- Initially, Freed deleted Lindke's comments; ultimately, he blocked him from commenting at all.

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Lindke v. Freed, 601 U.S. 187 (2024)

- Lindke sued Freed alleging that Freed had violated his First Amendment rights. As Lindke saw it, he had the right to comment on Freed's Facebook page because it was a public forum.
- The District Court concluded that Freed did not violate Lindke's rights. Lindke appealed.
- The Sixth Circuit Court of Appeals ruled that Freed had not transformed his personal Facebook page into a public forum or state action simply because he is a state employee who occasionally posted about his job.

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Lindke v. Freed, 601 U.S. 187 (2024)

- The Supreme Court held that a government official's social media posts can be attributed to the government only if the official had the **authority to speak on behalf of the government and was exercising that power when he created the social media post at the center of the dispute**.
- In a case where a social media page includes personal and official posts, courts must look at the post's **content and function** when considering whether the First Amendment applies.
- The critical question is whether the post was "actually part of the job that the State entrusted the official to do."

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Lindke v. Freed, 601 U.S. 187 (2024)

- Supreme Court in *Lindke* warned, "[a] public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability."
  - Maintain two accounts: one for personal matters and another for matters related to their public position.
- Use markers, such as labeling an account as a "personal page" or including a disclaimer (e.g., "the views expressed are strictly my own"). Not irrefutable – but greatly helps.

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Wallace v. Grand Island, 184 A.D.3d 1088 (4th Dep't 2020)

- Local Law No. 9 of 2015 amending the Town Code by prohibiting short-term rentals of less than thirty days, except in homes occupied by the homeowner (bed-and-breakfast facilities).
- One-year amortization period to allow pre-existing short-term rentals to terminate. It also permitted affected individuals to apply for an extension of the amortization period to allow additional time (up to three years), provided the applicant met certain criteria. Those criteria track the requirements for the granting of a use variance under N.Y. Town Law § 267-b.

Wallace v. Grand Island, 184 A.D.3d 1088 (4th Dep't 2020)

- Petitioner initially sought the one-year extension under the amortization period, which the Town denied. Petitioner did not challenge this denial.
- Then Petitioner sought a use variance. Again, because he failed to meet his burden, the Town denied this application.
- Petitioner commenced an Article 78 challenge seeking to overturn the denial of the use variance and the constitutionality of Local Law, which he alleged constituted a taking.
- Supreme Court dismissed the Petition, and an appeal ensued.
- On appeal the Petitioner limited his brief to the constitutionality and takings issues, thereby abandoning the challenge to the use variance denial.

Wallace v. Grand Island, 184 A.D.3d 1088 (4th Dep't 2020)

- The Fourth Department affirmed, holding that Petitioner did not meet his burden to invalidate the Local Law or prove that the law effectuated a taking.
- Key to the Court's rationale was Petitioner's own evidence, which showed that he could use the property for other lawful purposes: as a residence or as a rental with a long-term tenant. He could also sell the property. The use as a short-term rental, which was prohibited, was not the only option.
- "Indeed, plaintiff's submissions demonstrated that he had some economically viable uses for the subject premises, i.e., selling it at a profit or renting it on a long-term basis. It is immaterial that plaintiff cannot use the property for the *precise* manner in which he intended because a property owner 'is not constitutionally entitled to the most beneficial use of his [or her] property.'" *Wallace*, 184 A.D.3d at 1091 (emphasis and brackets in original).

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Takings Claims Challenging Short-Term Rental Regulation

- "The Takings Clause provides that no 'private property [shall] be taken for public use, without just compensation.'" *1256 Hertel Ave. Associates, LLC v. Calloway*, 761 F.3d 252, 261 (2d Cir. 2014) (citing U.S. Const. amend. V). "The clause applies to the states through the Fourteenth Amendment. *Id.* (citing *Kelo v. City of New London, Conn.*, 545 U.S. 469, 472, n.1 (2005)).
- "The property owner must show *more than* that the current zoning classification has caused a significant diminution in value, or that a substantially higher value could be obtained if an alternative use is permitted. Rather, the proper test is whether the owner can presently receive a reasonable return on his property. To succeed with a constitutional challenge, the owner must 'establish that no reasonable return may be had from any permitted use.'" *McGowan v. Cohalan*, 41 N.Y.2d 434, 436 (1977) (quoting *Williams v. Town of Oyster Bay*, 32 N.Y.2d 78, 82 (1973) (emphasis added)).

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Takings Claims Challenging Short-Term Rental Regulation (Cont.)

- A law that prohibits an existing property use "does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590, 592 (1962).
- To ascertain whether a regulatory taking occurred, several factors are often considered: the economic impact of the regulation, interference with investment-backed expectations, and character of government action. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978) (ultimately holding that the application of New York's Landmarks Law did not effect a taking on the appellants' property).

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Sikorsky v. City of Newburgh, et al., 23-1171-cv (2d Cir. 2025)

- Federal district court (S.D.N.Y.) dismissed *pro se* complaint against the City related to right to recover surplus foreclosure.
- Plaintiff failed to pay property taxes and the City of Newburgh foreclosed on the house.
- Plaintiff and the City had a contract to buy back the house, but it fell through.
- The City then sold the house for $250,000 more than what was owed by Plaintiff. But the City refused to give Plaintiff the surplus funds.
- Plaintiff sued in federal court, but the District Court dismissed the suit for failure to state a claim.
- Plaintiff then appealed, and with appointed counsel, perfected the appeal.

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Sikorsky v. City of Newburgh, et al., 23-1171-cv (2d Cir. 2025)

- Issue on appeal was whether Plaintiff stated a claim under the Takings Clause of the Fifth Amendment.
- Relying on the recent U.S. Supreme Court case *Tyler v. Hennepin County* where the Supreme Court held that the Fifth Amendment's Takings Clause, as applicable to the States via the Fourteenth Amendment, prohibits municipalities from using "the toehold of [a] tax debt to confiscate more property than was due." 598 U.S. 631 (2023).
- The Court vacated the dismissal and remanded the matter to the District Court for further proceedings.

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Sikorsky v. City of Newburgh, et al., 23-1171-cv (2d Cir. 2025)

- N.B. a similar case in N.D.N.Y. also relied on the *Tyler* precedent in a similar context related to surplus funds. *Polizzi, et al. v. County of Schoharie*, 1:23-CV-1311(DNH) (March 12, 2024).

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