



# Renewable Energy

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# What is a comprehensive plan and why is it important?

- ▶ A municipal comprehensive plan (also known as a master plan) is an expression of a community's vision and it charts a course for the future of the community in many different areas - e.g. land use, transportation, energy, economic development, historic preservation, etc.

# Renewable Energy

Typical examples of Renewable Energy include:

- ▶ Wind Energy Conversion Systems
- ▶ Solar Energy Conversion Systems

Each require open rural spaces with access to interconnect with a power grid.

A “SAMPLE” Wind Energy Facility Law is attached and will be referred to.

# ZONING BASICS

- ▶ The State of New York grants home rule authority to municipalities to enact local laws and ordinances to perform governmental functions.
- ▶ Zoning is a land use tool designed to help implement a municipality's comprehensive plan.
- ▶ Future growth and development of the municipality is controlled by zoning, which furthers the objectives of the comprehensive plan. Zoning has three (3) main components.
  1. **USE.** Zoning regulates the uses allowed in each district. For example, districts might be divided into their simplest form as residential, commercial, light industrial, and heavy industrial with specific uses permitted in one or more districts or some combination of uses.
  2. **DENSITY.** Zoning regulates how intensely uses may be developed by setting minimum and/or maximum lot sizes, and restrictions on the number of residential, office, or other units allowed in buildings within zoning districts.
  3. **SITING.** Zoning regulates where on a parcel primary and accessory structures can be built through setbacks, height limitations and limitations on building in certain areas, such as in floodplains or on steep slopes.

# Municipal Zoning Laws restrict the use of land

The use of land enjoys the highest degree of protection under both the Federal and State Constitutions. New York's Court of Appeals has held that Zoning Regulations are in derogation of the common law and must be strictly construed in favor of the property owner. See, Hogg vs. Cianciulli, 668 NYS2d 712 (2nd Dept. 1998), citing Allen vs. Adami, 383 NYS2d 565 (1976); D'Angelo vs. DiBernardo, 435 NYS2d 206 (Supreme Court Niagara County, 1980), affirmed 436 NYS2d 1021 (4th Dept. 1981).

This means that Zoning Laws that do not specifically prohibit land use may not somehow be expanded upon under the guise of interpretation to restrict one's use of their land.

In contrast, where the literal language of a statute is precise and unambiguous, that language is determinative. See, Encore College Bookstores v. Auxiliary Serv. Corp., 639 N.Y.S.2d 990, 994 (1994).

The point is that zoning laws should address and regulate renewable energy systems.

# A QUICK Review of Draft Legislation

## COMPONENTS

1. Authority
2. Findings
3. Who is authorized to review, process, and approve application.
4. Requirements
5. Definitions
6. Submissions
7. Application Review process
8. Standards that must be met
9. Traffic impact on roads (Sample Road Use Agreement is attached)
10. Decommissioning Bond ( Sample Decommissioning Bond is attached)

# Some Particulars

- ▶ Setbacks
- ▶ Noise
- ▶ Decommissioning
- ▶ Escrow Account and Application Fees
- ▶ Enforcement Penalties
- ▶ Wind Measurement Towers
- ▶ Small Wind Energy Conversion Systems

# General Consideration with any Home Rule Legislation

## 1. OPEN MEETING RULES

Open Meetings Law provides the public with the legal right to:

- Attend meetings of public bodies, listen to debates, watch the decision-making process take place;
- Be given notice of the time and place of meetings held by public bodies; and
- Ensure that a record of all actions is taken during meetings and are publicly available

In short, the law ensures that the public has physical or virtual access to meetings and records of decisions made when a public body has a meeting. It does not give the public the right to participate in the meeting by speaking before the public body. Although, the public body may allow the public to do so.

A public body is a group of two or more people that conduct public business and perform a governmental function for the state, an agency of the state, or for public corporations, including committees or subcommittees. This definition covers a wide-range of groups, including state agencies, city councils, town boards or village trustee boards, school boards, planning boards, ZBA's, any related sub-committees, and more. When these and similar groups meet, open meetings law applies.

The meetings of groups that are not created by law, like citizen advisory groups, are not required to comply with Open Meetings Law. Also, meetings of political committees and caucuses, judicial and quasi-judicial proceedings, and confidential matters protected by state or federal law, are exempt from Open Meetings Law.



# OPEN MEETING RULES

(continued)

As defined in Open Meetings Law (102(1)), a meeting is “the official convening of a public body for the purpose of conducting public business”. When a gathering to discuss public business achieves a quorum, the attendance of a majority of the full membership without vacancies, then the requirements of the open meetings law are triggered.

In 1978, the Court of Appeals declared that anytime a group’s majority gathers to conduct public business, regardless of whether a decision will be made or what the gathering is called, it is a meeting and is subject to open meetings law.

# OPEN MEETING RULES

(continued)

Executive Session is a portion of an open meeting that is closed to the public in order to discuss an issue that is among the eight items that are narrowly defined in the law. These eight items include:

- (1) matters that could threaten public safety is disclosed,
- (2) identify a law enforcement officer or informer,
- (3) relate to a potential, current or future litigation,
- (4) investigation or prosecution of a criminal matter,
- (5) collective negotiations,
- (6) various financial, credit, medical or employment details of a person or corporation,
- (7) proposed sale, lease or purchase of real property or securities, or
- (8) the details of employment examination prep, grading or administration.

Outside of these topics, all other deliberations of a public body at a meeting are required to be openly addressed before the public and with notice. Plus, to obtain legal guidance from its attorney.

The public must be given advance notice of the time and place of a meeting. But the length of time varies based on whether it is a scheduled meeting, impromptu or an emergency. The time and place must be posted in a conspicuous place and notice given to the public and media at least 72 hours prior to a meeting scheduled a week in advance and “as soon as practicable” for meetings scheduled less than a week in advance. If available, the notice must also be posted online.

# NY Town Law §264

- ▶ Adoption of Zoning Regulations
- ▶ Notify Town, Village, City and County Clerks of adjoining municipalities  $\geq$  10 Days before public hearing of legislation.

# COUNTY PLANNING AGENCY REFERRAL

General Municipal Law Section 239-m is intended to bring inter-community and county-wide planning and zoning considerations to the attention of neighboring municipalities. It requires local boards to refer certain types of land use actions to the county planning agency if the subject properties of the applications are within 500 feet of certain areas.

A written agreement between a municipal board and the county planning agency can list types of applications that do not have to be referred to the county.

# COUNTY REFERRAL

There are different kinds of geographic features that may trigger review by the county planning agency under General Municipal Law section 239-m. They include the following features:

- Municipal Boundary
  - Boundary of State or County Park or Recreation Area
  - R-O-W of State or County Road
  - R-O-W of County-Owned Stream or Drainage Channel
  - Boundary of State or County Land on Which a Public Building is Located
  - Boundary of a Farm Operation that is in a State Agricultural District (not area variances)
- ▶ If in doubt, send it out!!

# COUNTY REFERRAL TIMING

Once the county planning agency has received a complete statement of referral it will respond to the application in one of four ways. It can:

- 1) Recommend approval of the application as submitted
- 2) Recommend approval of the application with modifications
- 3) Recommend disapproval of the application; or
- 4) Report that the application will have no significant county-wide or inter-community impact.

## WHEN MAY MUNICIPALITY ACT?

The Municipality has jurisdiction to take final action when the earlier of the following occurs: it receives the recommendations of the County Planning Agency, OR thirty (30) days have passed since the county's receipt of the full statement.

It is important that the Municipality does not take action prematurely. The board cannot take early votes conditioned on the County Planning Agency's later recommendation for approval.

## MAY THE MUNICIPALITY OVERRIDE COUNTY RECOMMENDATIONS?

If the county planning agency recommends disapproval of the application, or approval with modifications, the Municipality may only act contrary to the county recommendation by a majority-plus-one-vote of all the members of the board.

Within 30 days after taking final action, the board must file a report of the final action with the county planning agency and, if applicable, state its reasons for acting contrary to the county's recommendation. The time period may be longer if agreed to by the county and local board.

# STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQR)

Agencies with land use review authority must consider the New York State Environmental Quality Review Act when adopting, or amending, Zoning Laws.

The State Environmental Quality Review (SEQR) process encourages review agencies to consider the environmental implications of proposed projects before making decisions.

The lead agency must either issue:

- (1) a negative declaration, which finds that the project will not result in a significant adverse environmental impact; or
- (2) a positive declaration, which finds it may have one or more significant adverse affects on the environment. If an agency issues a positive declaration, an environmental impact statement must be prepared prior to the action.

# TAXATION & PILOTS

## Real Property Tax Law (RPTL) Section 300

All real property within the state shall be subject to real property taxation, special and valorem levels, and special assessments unless exempt therefrom by law.

Cornell University vs. Board of Assessment Review (CA19-00339) (Solar arrays are assessable improvements).

## RPTL Article 4-Exemptions

RPTL §487 provides an exemption for alternative energy systems including wind and solar. A qualifying project is fully exempt from General Municipal & School Taxes for 15 years related to the added value of the system.

Tax Jurisdictions (School, County, City, Town or Village) may initially “OPT OUT” and not grant any exemption or PILOT regardless of scale. This means a project would ordinarily be fully taxable absent the grant of a PILOT from another Agency.

County Industrial Development Agencies (JCIDA) are authorized in Article 18-A of NY General Municipal to enter into PILOT Agreements. Each IDA is required by law to establish a Uniform Tax Exemption Policy (UTEP) that defines what benefits they may offer. This may include exemption from

- Real Property Taxes
- Sales Taxes, and
- Mortgage Recording Taxes



# POLICY

- ▶ Green Energy Goals 70-30 and 100-40 - its impact on Home Rule

# MORATORIA

# What is ARTICLE 10?

- ▶ Article 10 (also known as Article X) is part of the New York State Public Service Law, §160 - §173, and it provides for the siting of major electric generating facilities. A major electric generating facility is defined as having a nameplate capacity of 25 MW (megawatts) or greater per year.
  - ▶ **Nameplate Capacity:** Also known as the rated capacity, nominal capacity, installed capacity or maximum effect, nameplate capacity refers to the intended technical full-load sustained output of a facility such as a power plant, a chemical plant, fuel plant, metal refinery, mine, and many others. (Wikipedia)
  - ▶ **Megawatt:** A watt is a unit of power that measures the rate of energy conversion or transfer; a mega watt is a measure of power equal to one million watts.
- ▶ Article 10 (also known as the Power NY Act) was signed into law in 2011. It places the siting authority in the control of the Siting Board (Board on the Electric Generating Siting and the Environment), which consists of five (5) members from state government agencies and two (2) ad-hoc members from the locality in which a facility is being proposed. Prior to the enactment of the revised Article 10 in 2011, and following the expiration of an earlier version of Article 10 in 2003, the siting of large facilities was subject to any regulations of the local municipality, as well SEQR (State Environmental Quality Review) regulations. The shift of approval authority from local governments back to the state is a significant aspect of Article 10, and it has raised concern among local governments and supporters of "home rule."

# Article 10 (Continued)

- ▶ While wind speed and the size of the turbines are important variables that will influence the size of a wind farm, one can get a sense of size by considering the details of the Fenner Wind Farm in Madison County. Each turbine has a generating capacity of 1.5 MW and, from the ground to the center of the hub, is 213 feet.
- ▶ From the ground to the tip of the upper vertical blade, the turbines are 328 feet. With a designed total capacity of 30 MW, 20 turbines were originally installed in an area that measures about 1.5 miles wide by 2.5 miles long. A wind farm with seventeen (17) such turbines would trigger Article 10.

# Article 10

(Continued)

## ▶ SITING PROCESS

### ▶ There are five phases to the siting process:

1. Pre-application;
2. Application;
3. Administrative Hearings;
4. Siting Board Decision; and
5. Compliance.

The process includes extensive public participation and notification requirements and is designed to engage the public at the earliest stages and throughout the review process. A Public Involvement Program (PIP) must summarize activities to educate, inform and involve the public and be submitted by the applicant at least 150 days before filing the Preliminary Scoping Document.

- ### ▶ The applicant must pay a fee to fund a pre-application intervenor account (\$350/MW, not to exceed \$200,000). At least half ( $\frac{1}{2}$ ) of these funds must be available for municipal parties and up to half ( $\frac{1}{2}$ ) for local parties to hire expert witnesses, consultants, or lawyers. These intervenor efforts will contribute to a complete record. During application stage the fee is \$1000/MW, not to exceed \$400,000

# Article 10

(Continued)

- ▶ What effect does Article 10 have on municipal home rule?

Reasons for state preemption of local home rule authority include "matter of state concern." New York State's electricity generation goals, including those from alternative sources such as wind and solar, may be considered a matter of state concern.

# "Unreasonably Burdensome" and Substantive vs. Procedural Requirements

- ▶ Before issuing a certificate of construction or operation for a major electric generating facility the Siting Board must determine that a host of requirements are met, including Public Service Law §168 (e) the facility is designed to operate in compliance with applicable state and local laws and regulations issued thereunder concerning, among other matters, the environment, public health and safety, all of which shall be binding upon the applicant, except that the board may, elect not to apply, in whole or in part, any local ordinance, law, resolution or other action or any regulation issued thereunder or any local standard or requirement, including, but not limited to, those relating to the interconnection to and use of water, electric, sewer, telecommunication, fuel and steam lines in public rights of way, which would be otherwise applicable if it finds that as applied to the proposed facility such is unreasonably burdensome in view of the existing technology or needs or costs to ratepayers whether located inside or outside of such municipality. The board shall provide the municipality an opportunity to present evidence in support of such ordinance, law, resolution, regulation or other local action issued thereunder.

# What are the local regulatory options for wind energy facilities that fall below the threshold set in Article 10?

- ▶ For electrical generating facilities falling below the 25 MW threshold, a municipality's home rule is not preempted by Article 10.
- ▶ That is to say, a municipality may choose to restrict or prohibit proposed facilities under zoning, review facilities under Site Plan Review (which can be adopted in a municipality with or without zoning), or choose not to adopt regulations addressing such facilities .

# What is the relationship between SEQR and Article 10?

- ▶ Actions requiring a certificate of environmental compatibility and public need under Article 10 of the Public Law are classified as Type II actions under SEQR.
- ▶ Type II actions are, by regulation, those actions which never require further SEQR review (see NYCRR §617.5 (c) (44)).
- ▶ In place of SEQR, Article 10 includes numerous environmental impact provisions, as outlined above and detailed in the text of the law.



# THE SITING BOARD

- ▶ The five permanent members of the Siting Board are the Chair of the Department of Public Service who serves as chair of the Siting Board; the Commissioner of the Department of Environmental Conservation; the Commissioner of the Department of Health; the Chair of the New York State Energy Research and Development Authority; and the Commissioner of Economic Development.
- ▶ "Ad hoc" is a Latin term meaning "for this special purpose." Two ad hoc members will be appointed for the special purpose of providing a local voice in each proceeding conducted to consider specific individual applications for certificates. Each facility application will have its own unique ad hoc members and therefore its own unique Siting Board.

# THE SITING BOARD

(continued)

- ▶ To be eligible to be an ad hoc public member, the person must:
  - (a) be eighteen years of age or older,
  - (b) be a citizen of the United States;
  - (c) be a resident of New York State;
  - (d) be a resident of the municipality in which the facility is proposed to be located
  - (e) not hold another state or local office; and
  - (f) not retain or hold any official relation to, or any securities of an electric utility corporation operating in the state or proposed for operation in the state, any affiliate thereof or any other company, firm, partnership, corporation, association or joint-stock association that may appear before the Siting Board, nor shall the person have been a director, officer or, within the previous ten years, an employee thereof.

# THE SITING BOARD

(continued)

- ▶ If such facility is proposed to be located in a town outside of any villages or in a city other than the City of New York, the chief executive officer representing the municipality shall nominate four candidates and the chief executive officer representing the county shall nominate four candidates for consideration.
- ▶ Cooperate with each other to create a “short list” of candidates.

# MAJOR CHANGES

## to the approval and permitting of renewable energy projects in NYS

- ▶ In early April 2020, the NYS Legislature passed a budget bill that included an amendment meant to dramatically speed up the permitting of renewable energy projects in New York State. The new amendment - referred to as **Section 94c of the Executive Law** - stems from (and successfully maintained) many aspects of the Governor Cuomo's "Accelerated Renewable Energy Growth and Community Benefit Act."
- ▶ The proposed changes have already gone into effect and include: the establishment of an Office of Renewable Energy Siting (ORES), a Clean Energy Resource Development and Incentives Plan, Grid Planning and Energy Delivery Constraint Relief, and Local Community and Participation Benefits.
- ▶ The Article 10 review and approval process came into play in 2012 and replaced the typical SEQR/site plan review and approval processes most familiar to municipalities. Under Article 10, the final decision to approve a large-scale solar or wind project rested with the state instead of local government.
- ▶ Now, Article 10 is being replaced for almost all large-scale projects with a new process intended to streamline approvals. State regulations for the new Section 94c are currently under preparation. Section 94c process (\$1,000/Megawatt), Projects approved under 94c will need to demonstrate "compliance with local laws."
- ▶ Although the state has one year to develop detailed regulations, project applications can now be submitted under 94c, and approvals will be expedited (one year or less)

# ARTICLE 23

## Economic Development Law

### A/K/A 94-c Process

- ▶ Article 10 required large projects to proceed through a multi-staged and multi-year permitting process before the NYS Board on Electric Generation Siting and the Environment.
- ▶ 6± projects have been approved, but more than 50 projects continue in the pipeline.
- ▶ Accomplishing the 70/30 Goal and 100/40 Goal of renewable energy facilities is unlikely via Article 10.
- ▶ Article 23 of the Economical Development Law is more streamlined.
- ▶ Projects 25 Mega Watts and greater are required to utilize Article 23.
- ▶ Projects 10-25 Mega Watts may use Article 23.
- ▶ Projects currently pending in the Article 10 pipeline may opt into Article 23.
- ▶ The Article 23 timeline is much faster than an Article 10 timeline. <sup>29</sup>

# NYS Energy and Research Development Authority (NYSERDA)

- ▶ NYS Energy and Research Development Authority (NYSERDA) must identify and develop “build ready sites” including site control, interconnection and tax agreements for renewable energy facilities.
- ▶ NYSEERDA will provide a more “uniform” real property assessment methodology for projects.
- ▶ Article 23 is administered by a newly created Office of Renewable Energy Siting within NYS Department of Economic Development (NYSDED).
- ▶ The NYSEDED will promulgate rules necessary to implement the Article 23 Siting Permit Program. Until then, application under Article 23 will substantially conform to an Article 10 application.

# OFFICE OF RENEWABLE ENERGY SITING

- ▶ The Office must determine whether an application is complete within 60 days.
- ▶ The Office has 60 days to submit the permit conditions for public comment.
- ▶ Office of Renewable Energy Siting must render a final decision within 1 year after the application is deemed complete.
- ▶ That time line is reduced to 6 months if the facility is proposed to be sited on an existing or abandoned commercial use site, including brown fields.
- ▶ If the Office fails to meet these shorter timelines, then the application will be approved by default.
- ▶ Aggrieved parties may seek Judicial Review by an Article 78 Special Proceeding within 30 days after the grant or denial of a permit.

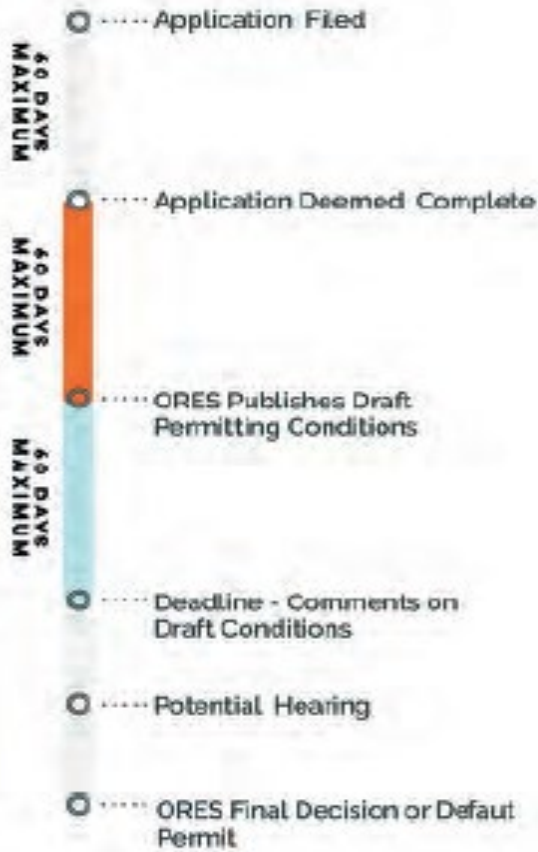
- ▶ Applicants must pay a \$1,000 per megawatt application fee that will be disbursed to local agencies for their participation in the Article 23 public comments periods and/or hearing timelines. (\$350/MW per application and \$1000/MW application with Article 10)
- ▶ There is no intervener fund for non municipal parties.
- ▶ At the end of the public comment period or hearing, the Office will issue a final siting permit with any necessary conditions.
- ▶ Article 23 strengthens the power to set aside all local law(s) so long as municipalities have been provided with notice of the application.
- ▶ The application is not required to comply with all local laws. The Office may elect not to apply, in whole or in part, any local law or ordinance which would otherwise be applicable if it finds that, as applied to the proposed project, it is unreasonably burdensome in view of the law targets and the environmental benefits of the proposed major renewable energy facility.



- ▶ Municipalities must consult with NYSERDA in determining the annual payments to be required under a PILOT.
- ▶ Importantly, the value of a project will be determined by an income capitalization or discounted cash flow approach through an appraisal model identified, and published by the State Department of Taxation and Finance and NYSERDA.
- ▶ Article 7 of the NY Public Service Law is revised with a one year time line unless extended by agreement.

>25 MW may also opt in

SIX MONTHS MAXIMUM



>50 MW may also opt in

ONE YEAR MAXIMUM



# 94-C Process

replaces the previous “Article 10 Process”

- ▶ April 3, 2020: Governor signed into law the Accelerated Renewable Energy Growth and Community Benefit Act as part of the 2020-2021 budget bill. <https://ores.ny.gov/system/files/documents/2020/07/ores-2.pdf>
- ▶ September 16, 2020: Newly created Office of Renewable Energy Siting issued draft proposed regulations for New York’s new large-scale renewable energy permitting process. <https://www.jdsupra.com/legalnews/top-10-things-to-know-about-new-york-65218/> ; <https://ores.ny.gov/regulations>
- ▶ November 16, 2020, deadline for stakeholders and the public to submit comments on the draft regulations (Chapter XVIII Title 19 (Subparts 900-1 - 900-5; 900-7 - 900-14)). <https://ores.ny.gov/regulations> (this address includes the portal for submission of comments)
- ▶ November 17-November 30, 2020: covers seven dates for public hearings at different locations across the state on the proposed regulations. <https://www.youngsommer.com/2020/news/new-york-proposes-regulations-for-the-siting-of-renewable-energy-projects>
- ▶ December 7, 2020: Last date for submission of public comments on the uniform standards and conditions. (Chapter XVIII Title 19 (Subparts 900-6)). <https://www.natlawreview.com/article/pleasing-all-people-some-time-new-york-simultaneously-proposes-regulations>