



**Division of Local
Government Services**

Hot Button Land Uses

A Division of the New York Department of State

Can a use be prohibited?

Exclusionary Zoning

- Regulations that singly or in concert tend to exclude low or moderate income housing municipal-wide; i.e.,
 - Large lot or high minimum square footage requirement
 - Excluding multiple dwellings or manufactured housing

Most non-residential uses may be zoned out if the exclusion is supported by the comprehensive plan



Spot zoning

- Parcel can be rezoned to allow use supported by comprehensive plan
- Zoning changes must be reasonably related to legitimate public purposes

“the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners”

Rogers v. Tarrytown, 302 NY 115, 96 NE2d 731 (1951)

Inform and involve

- Unearth controversy early
 - Receptive to change
 - Before the public feels steamrolled
- Potentially controversial projects
 - Hold informational meetings with residents & stakeholders



Positive press for controversial issues

Bad press usually results from ignorance, not bias:

- Inaccurate, or wrong conclusions from facts
- Accurate, but unfavorable tone
- Overly selective or unbalanced reporting
- Blurred lines between fact and opinion

Remedy ignorance with non-confrontation

- One spokesperson controls message
- Be prepared to correct false assumptions
- Response plan: phone, press release, news conference



Community opposition

Generally not a valid basis for denying most applications--if the use is already permitted by zoning, and requirements are met.



Comprehensive planning

- Reduces controversy
- Legal support
- Infrastructure investments
 - Identifies areas for municipal & private investment
- Public input on controversial issues

Municipalities with Comprehensive Plans

- Cities 92%
- Towns 71%
- Villages 66%
- All 76%

Source: NYS Legislative Commission

Moratoria

Adopt moratorium law to:

- Update comprehensive plan to consider new uses
- Update regulations to prevent:
 - hasty decision
 - unplanned & inefficient growth
 - construction inconsistent with comprehensive plan



Wrong reasons for moratoria:

- Slow development hoping developer will go away
- Halt development while municipality considers buying land

Examples

Adult uses



- Cannot prohibit (1st Amendment protection)
- Regulate with zoning
 - Must provide viable locations
 - Definitions must be clear
- Aim regulations at secondary effects

Religious Land Use & Institutionalized Persons Act (RLUIPA)

Religious uses are not exempt from land use regulations

- Municipalities may not:
 - Place “substantial burden”
 - Zone out of residential districts
 - Prohibit if impact similar to other allowed uses
- May regulate characteristics of physical environment: lot coverage, parking, signage



Barn “promotional” events



May be protected as part of a farm operation if:

1. directly relate to sale/ promotion of beverage produced on farm (at least 51% on-farm produced grain, hops, grapes/fruit/juice);
2. incidental and subordinate to retail sale of beverage on-site;
3. hosted by farm or farm customers (not outside, unrelated parties); and
4. feature beverage produced at the farm

Farm Wineries/Distilleries in State Ag District

Although State Liquor Authority license may allow sale of alcoholic beverages not made from crops grown by farm, they are not part of a farm operation.

Production and sale not necessarily protected under AML Article 25AA § 305-a.



State Alcoholic Beverage Control Laws define:

- farm cidery,
- farm distillery,
- farm winery, and
- farm brewery

Barn Events without Ag District Protection

If barn is not in State Ag District or barn rental revenue exceeds that of food production, municipalities can restrict:

- Hours of operation
- Number of events per month
- Prohibit regular rentals of farm buildings for weddings



A partnership to review impacts

Agriculture & Markets

- Farm operation?
- In an agricultural district?
- Zoning definitions
- Is activity permitted?
- Is variance needed?
- Cost and time, etc.

Municipal Regulations

- Reasonable
- Public health & safety threatened
- Amendments needed
- Is an expedited review an option?

Farm worker housing

- Agriculture & Markets Law § 25-AA
 - State Certified Agricultural Districts
- Address in zoning or adopt local law
 - Show proof of continuing employment on the farm
 - Do not allow the creation of new lots
 - Do not allow permanent additions to the home

Manufactured homes

Federal:

- Manufactured Housing Act 1974 regulates construction and safety issues; must display HUD seal or data plate.

State:

- Uniform Fire Prevention and Building Code (9 NYCRR Part 1220);
- Manufacturer's Manual;
- DOH (Sanitary Code Part 17) manufactured housing community of 5+ homes;
- **NY Ex. Law, Article 21-B, Title 2 (11/20/15) considers manufactured home equal to single family dwelling “Identical Development Specification and Standards”**

Manufactured homes at the local level

Regulate:

- Health, safety, general welfare
- Zoning (lot size, setbacks, Special Use Permit); Site Plan Review
- Skirting, as this is an optional installation



Can't regulate:

- Completely exclude as single family dwelling
- Foundations
- Based upon age if home passes required NYS Uniform Fire Safety and Building Code inspections

Recreational Vehicles as residences

RVs do not meet manufacturing requirements for permanent occupancy as detailed in the [NYS Uniform Fire Prevention and Building Code](#);

RVs are not capable of being well-heated in the winter months and do not meet the [NYS Energy Conservation Construction Code](#)



Recreational Vehicles in the Uniform Code

Not “manufactured homes” or permanent dwellings:

- A vehicle that is ... designed primarily **not** for use as a permanent dwelling, but as temporary living quarters for recreational, camping, travel or seasonal use.
[2020 Building Code of NYS Appendix G: Flood Resistant Construction](#)
- The term “manufactured home” shall not include any self-propelled recreational vehicle.
[2020 Residential Code of NYS](#)



Local definitions...

...can state a position regarding residential use:

- Recreational vehicle: A vehicle with or without motive power, which is designed for recreational use and human occupancy, and which meets the following qualifications:
 - (a) Is not used as the permanent residence of the owner or occupant;
 - (b) Is used for temporary living quarters by the owner or occupant while engaged in recreation, travel, or vacation activities;
 - (c) Is towed or self-propelled on public streets or highways incidental to such recreation or vacation activities.
- Examples: motor homes, fifth-wheel trailers, van campers, tent camping trailers, self-contained travel trailers, pick-up truck campers, camping buses, and self-contained self-propelled truck chassis mounted vehicles with living accommodations.

Shed “Dwellings”

- Pre-assembled, low cost structure converted to tiny homes or permanent additions often without permits
 - Does not meet NYS Uniform Fire Prevention and Building Code
 - Not a “dwelling”
- Define and distinguish shed, tiny home, accessory structure”
 - Tiny home is 400 sf or less “dwelling”; must meet emergency escape/rescue openings per Residential Code Appendix Q



Group homes for the disabled

- “A community residence established pursuant to this section and family care homes shall be deemed a family unit, for the purposes of local laws and ordinances.”
 - Mental Hygiene Law § 41.34
- Will facility result in a concentration of similar homes to the extent that community character is altered?



Home day care

Enforceable: fire, building and health regulations

Not enforceable: anything beyond underlying residential use such as:

- minimum lot size
- minimum floor-space per child
- off-street parking
- off-street pickup/drop-off areas
- no outdoor play area after ___ P.M.

Definitions are important:

- “Family home day care” and “Group family home day care” allowed by right in single-family and multi-family dwellings
- “Child day care center” and “school age child care” are different, and fully subject to zoning

Home Occupations

Must be wholly within primary structure, not exceeding 15% floor area

- No more than 1 person not residing there may be employed
- Inventory/supplies not to occupy more than 50% of permitted area
- May not involve any hazardous operation



NYS Residential Building Code AJ102.5

Backyard chickens

Restrict for personal use, not onsite sale of eggs or poultry:

- Personal use exempts state licensing and inspection requirements.
- State regulations for avian diseases (i.e., Exotic Newcastle Disease and Avian Influenza) apply to all chicken owners



Consider regulating:

- ✓ Number of birds, gender
- ✓ Setbacks for coops/pens
- ✓ Feed storage location
- ✓ Fences
- ✓ Cage size, height, materials

Pet facilities and uses

Non-commercial

- Adoption centers
- Pounds
- Shelters
- Private pet ownership

Commercial

- Veterinarians/animal hospitals
- Groomers, breeders, trainers
- Kennels, day care and boarding

Kennels

- NYS Ag & Markets does not define or regulate kennels but “protects” livestock (not dogs or cats)
- Ag & Markets regulates pet dealers (sellers and breeders) and determines thresholds for retail and wholesale, requires dog licensing, etc.
- Munis can restrict kennels and pet dealers but can't be so restrictive as to completely ban breeding and sale of dogs and cats
 - Municipal regulations cannot be less restrictive than §407 AML

Pet facilities and uses

Regulate or require

- Number of animals
- Minimum lot size and setbacks
- Parking requirements
- Hours outside on run
- Sound attenuation, buffering and screening
- Emergency response plan

Reviews

- With zoning: Special Use Permit; Site Plan review
- Without zoning: Site plan review
- Ability to impose conditions on approval

Doggie day care

- Define use
 - Number of dogs per day
 - No overnights
- Potential impacts
 - Noise/sound
 - Parking
 - spaces per dog/staff
 - drop off area



“Commercial facility for supervised dog care for less than 24 hours a day, not including facilities that provide boarding, breeding or selling of dogs, or facilities whose primary revenue is licensed veterinarian services.” Town of Amherst

Short-term rental housing

Precise definitions:

- Generally rented for less than 30 days
- Permanent provision for living, sleeping, eating, cooking, and sanitation
- Owner not necessarily on site



Short-term rental housing

Pros

- Supplemental income to owners
- Discounted lodging and interesting tourist experience for guests

Cons

- Transient guests
- Excessive noise
- Increased traffic
- Commercial use in residential district
- Unfair competition to hotels
- Lost lodging tax revenue
- Inflated housing costs

Restrictions

- Definitions
- Restrict by zoning district
- Cap number of rental nights



Operational Restrictions

- Maximum occupancy limits
- Rental period and frequency
- Parking
- Noise
- Emergency access
- Mandatory designated representatives
- Trash and refuse



Mining

Regulate with zoning:

- Restrict to districts or municipal-wide
- SUP with conditions:
 - Ingress & egress
 - Truck routes

Regulate without zoning:

- Site Plan Review



DEC mining permit process

Municipalities submit recommendations to NYS DEC:

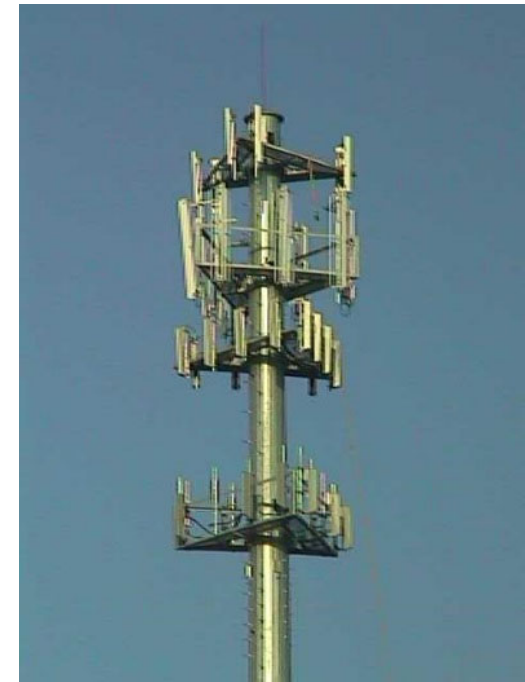
Setbacks from

- property boundaries
- public R-O-W
- Dust control
- Hours of operation
- Barriers restricting access



Cell towers as public utility

- Cell towers defined as a public utility, and have greater protection against restrictive zoning than ordinary commercial uses.
- Compelling reasons to grant use variance:
 - Necessary to provide safe & adequate service
 - Significant gaps in coverage if placed on alternative sites



Cellular Telephone Co. v. Rosenberg (NYS Court of Appeals, 1993)

Telecommunications Act of 1996

Municipality must not

- Prohibit personal wireless service
- Unreasonably discriminate among providers
- Regulate based on health effects from RF emissions

Municipality must

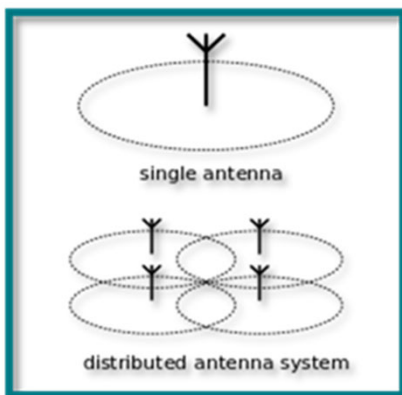
- Act on applications within “reasonable period of time”
 - 90 days for co-locations
 - 150 for new locations

Section 6409



Middle Class Tax Relief & Job Creation Act of 2012

- Local governments must approve applications that do not substantially change physical dimensions of towers or base stations.
- “Substantial” – increase of more than 10% in height or by height of additional antenna array; mounting additional antenna that would protrude more than 20 feet or width of tower structure; excavation outside current tower site
- Distributed Antenna System (DAS)/small cell technology presents a new set of challenges.



A diagram contrasting a single antenna configuration with DAS

5G, Small Cell

- 2018, Federal Communications Commission (FCC) Declaratory Ruling to “remove regulatory barriers that inhibit the deployment of infrastructure necessary for 5G and other advanced wireless devices services”.
- WT Docket No. 17-79 and WC Docket No. 17-84 at <https://docs.fcc.gov/public/attachments/DOC-353962A1.pdf>.



FCC Rules for 5G: Shot Clock

- Co-Location on Preexisting Structures: 60 days
- New Poles: 90 days
 - Delays could be argued by providers as effective prohibition of service. Carriers arguing so successfully in court would result in court order to permit.
- Shot clocks are the same for “batched” applications; can agree to different time periods by mutual agreement between municipality and carrier
- Shot clock commencement can’t be delayed by a pre-application meeting
- Applies to all permits required for deployment, including zoning, electrical, engineering, architectural, road closure permits, etc.

FCC Rules for 5G: Shot Clock

- What happens if an application is incomplete?
- Local governments may re-set or pause the shot clock when it determines that an application is incomplete
 - 10 days: Municipality should make a determination that an application is materially incomplete
 - Municipality must notify the applicant of the deficiencies
 - The shot clock resets when the completed application is filed
- An incompleteness determination must be made by the 30th day after an application is filed, and within 10 days after resubmission if a re-submitted application is still incomplete

FCC Rules for 5G: Fees

“Safe Harbor” fees:

- \$500 per application for up to 5 small cells; \$100 for each additional node.
- \$270 annual fee per small cell facility (covers right-of-way access, attachments, and reoccurring fees)
- \$1000 for non recurring fees for a new pole
- If carrier files lawsuit challenging fees above safe harbor amounts, local government has burden of demonstrating amounts are reasonable

Aesthetic Concerns

- Permissible for location, screening and color, but should not be more restrictive than local government requires for other infrastructure
- Examples of prescriptive and predictable regulations: Denver, CO and Montgomery County, MD



Right-of-Way Concerns

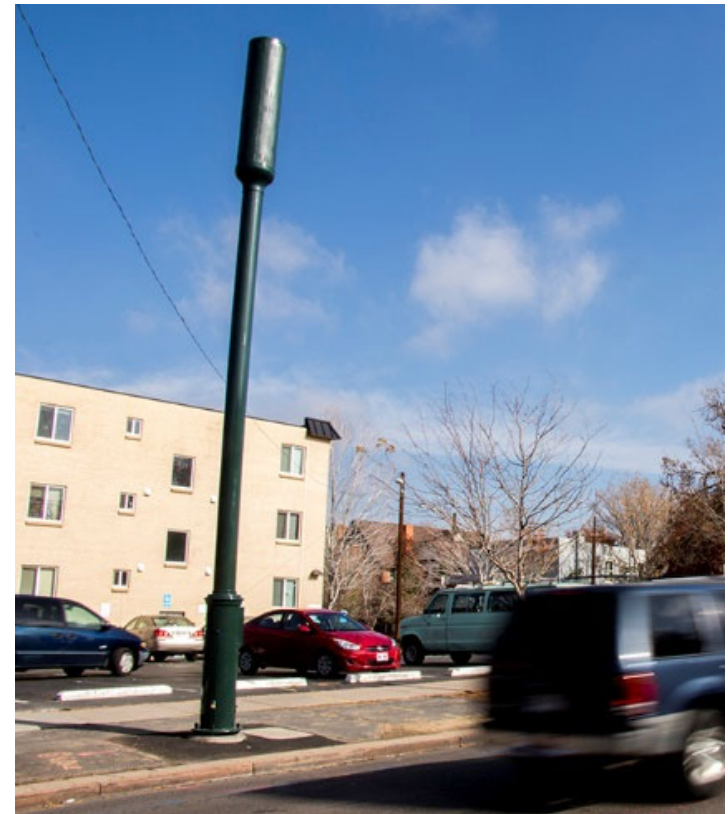
- Municipality should adopt standards for wireless installations on traffic lights, street lights, and utility poles to ensure they don't limit structure's primary function
- Establish rules for turning off wireless facilities when utility workers are present



Tips

Do not:

- Adopt a moratorium (forbidden in the order)
- Deny applications based on environmental effects of RF waves
- Impose spacing requirements (can be construed as effective prohibition)



Tips

- Be sure instructions and application materials required are clear to wireless companies
- Quickly determine if application is complete
- If fees exceed “safe” levels, the local government might be challenged in court to demonstrate how higher fees are reflected in higher administrative and permitting costs by municipality.



Adult use cannabis in NYS

- Marijuana Regulation & Taxation Act
- Adult use 21+ years of age
- May possess, display, purchase, obtain or transport up to 3oz of flower, 24g of concentrated cannabis
- Expands NY's existing medical marijuana program
- Permitted to smoke cannabis in public wherever tobacco is allowed (subject to local restrictions)
- Consumption not allowed in schools, federal lands, workplaces, or vehicles

Cannabis retail

Two types of retail sites:

- **Dispensaries:** storefronts to buy product for home consumption
- **Adult use consumption sites:** lounge-like locations for purchase and use on-site
- Cannabis delivery license included in MRTA (deliveries to home)



Cannabis NYS regulations

- Office of Cannabis Management & Cannabis Control Board Members:
 - Tremaine Wright, Chair, Jessica Garcia, Reuben McDaniel, Jen Metzger, Adam Perry
- Board will approve regulations for production, licensing, retail, packaging, labeling, use, etc. First sales not expected until 2022, early 2023
- State focus on diversity and small-scale production
 - Cannot own cultivation license and dispensary except for existing medical operators, microbusinesses, and cooperatives (owns all methods of production and only sells own products)
- Goal of awarding 50% of licenses to social equity applicants (individuals impacted from cannabis enforcement, minority or women owned enterprises, distressed farmers, disabled veterans)
- **Home grow:** adults allowed 3 mature and 3 immature plants; 12 plants max per household. **Not allowed until Board approves regulations which must be within 18 months of first retail sale**

Cannabis economic impact

- Cannabis sales tax: 13%
 - State: 9%
 - Local: 4%
 - 75% to municipality
 - 25% to county
- THC excise tax (collected at wholesale):
 - 0.5 cents per milligram of flower
 - 0.8 cents per milligram of concentrated cannabis
 - 3 cents per milligram of edible cannabis products
- Estimated \$3B - \$4B industry, \$350M tax revenue annually when market is mature; creation of 30,000-60,000 jobs



Cannabis local regulation

- Municipalities had until 12/31/2021 to opt out of any dispensary or on-site consumption site within their jurisdiction
- Municipalities have reasonable control over local zoning and time, place and manner
- Municipalities cannot opt out of grow, testing or packaging facilities
- May not opt-out of legalization (e.g., prohibit adult personal cannabis use in homes)
- For more info: <https://cannabis.ny.gov/>



Cannabis and public health

Cannabis law calls for a robust regulatory framework rooted in protecting public health and safety

- Regulation of product types and ingredients
- Required laboratory testing
- Product serving size, packaging and labeling requirements
- Restrictions on advertising and marketing
- Childproof packaging
- Appropriate health warnings

Cannabis and public health con't.

- Minimizing harm to the public through:
 - Development of public education campaigns (stay tuned!)
 - Prevention and enforcement of impaired driving and youth use
 - Adoption of policies to promote and protect health equity, and
 - Investment in public health and safety programs
- Comprehensive data monitoring of trends in cannabis use and related public health and safety outcomes
- Supporting efforts to increase the knowledge and research base on the impacts of cannabis legalization

Billboards

- Can't regulate content
(1st Amendment protection)
- Can regulate size and location
(State Uniform Code; zoning;
site plan review; local permits)
- NYS DOT regulates signs along
interstate and primary highways
(Municipality may be more restrictive than DOT)



Temporary signs

- Regulation should be content neutral
- Regulate physical characteristics that impact:
 - traffic safety, aesthetics, property values
 - size, height & location:
 - ban all signs on public property
 - Permits: apply to all signs
 - Duration: apply evenly
 - Fees: relate to administrative costs



Junk

- Require junkyards to be licensed;
- Limit locations through zoning;
- Adopt junk storage regulations to address household debris, not just abandoned vehicles.

OR

- Enforce NYS Motor Vehicle Junkyard Law (General Municipal Law §136), and NYS Uniform Fire Prevention Building Code (§302.8 Motor vehicles)



Junk Laws

- General issues stemming from inadequate storage or disposal of litter, debris, and junk
- Adopt business licensing laws, including licensing of junkyards, junk dealers, and dealers in second hand articles.

Property Maintenance Laws

- Trimming of shrubs and lawns, repair of fences, and similar aesthetic, health and safety issues
- Unsafe buildings, drainage/discharge, lot maintenance

Solid waste facilities

Includes storage, transfer, disposal, treatment or internment of landfills, open dumps, and transfer stations

REGULATION

- With zoning: as of right, SUP
- Without zoning: site plan review
- State: NY ECL § 27-0701(1) & 6 NYCRR 360
- Federal: Resource Conservation & Recovery Act of 1976 (40 CFR Part 258)



Exceptions

DEC permit & registration not needed for certain Construction & Demolition (C & D) landfills determined by:

- Hours of operation (sunrise & sunset)
- No fee
- Debris type
 - Must be recognizable
 - Must originate & be disposed of on properties under same ownership or control

- Recognizable: uncontaminated concrete & concrete products (steel or fiberglass reinforcing rods embedded in concrete, asphalt pavement, brick, glass, soil & rock)
- Trees, stumps, yard waste & wood chips

6 NYCRR Part 360 – 7.1(b)

Solar

Tier I: Roof-mounted or building-integrated solar energy systems.

Tier II: Ground-Mounted systems that generate up to 110% of electricity consumed on site over previous 12 months.

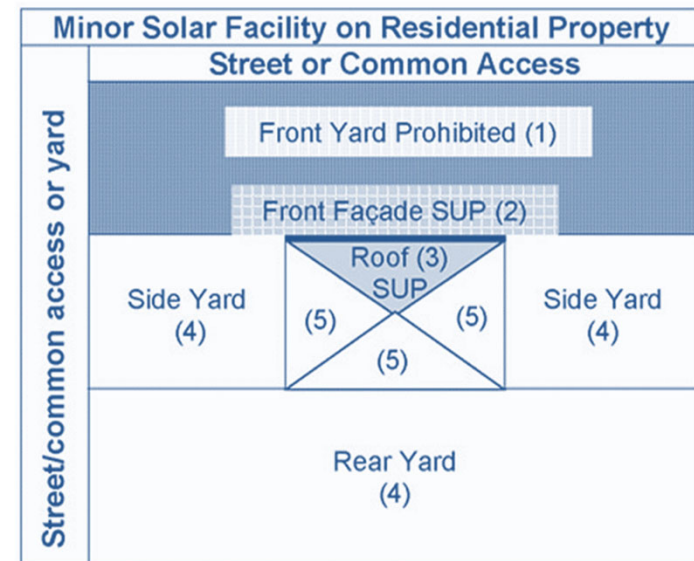
Tier III: Solar as primary use.

Projects less than 20 mw reviewed locally.

Projects more than 25 mw reviewed by Office of Renewable Energy Siting (ORES).

Solar and neighborhoods

- Avoid front yard installations; minimize visibility from road
- Avoid permanent loss of character-defining features of historic buildings
- Locate on non-historic buildings or additions



Tier III: Solar as primary use

- Special Use Permit
- Site Plan Review
- Industrial and agricultural zones
- Adverse impacts
- Lot size
- Screening
- Battery storage
- Safety
- Decommissioning



Agricultural and environmental areas

Prohibit or avoid installation:

- Farmland, prime or unique soils, soils of statewide/local significance
- Wetlands, floodplains, under most circumstances
- Critical Environmental Areas

NYS Department of Agriculture and Markets:

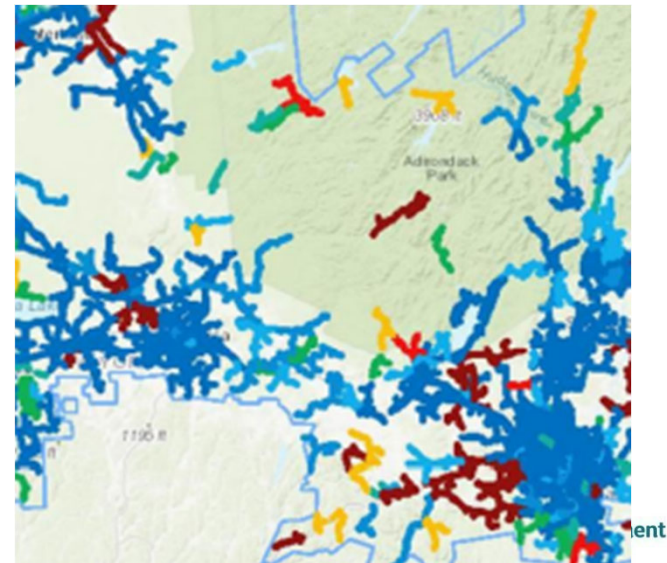
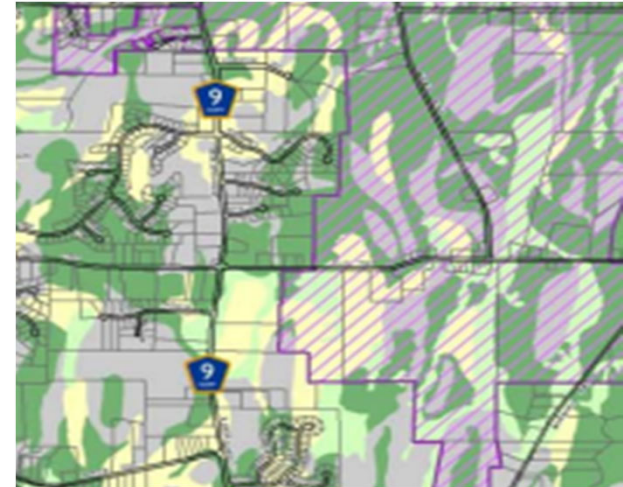
“Guidelines for Agricultural Mitigation for Solar Energy Projects”

https://www.agriculture.ny.gov/ap/agservices/Solar_Energy_Guidelines.pdf

Hosting Capacity

Not every location is feasible for renewable energy development

- Access to transmission lines is critical
- Steep slopes must be avoided
- Other sensitive areas should be avoided
- When transmission lines are close to prime farmland: mitigation



Wind

Distinguish between residential, agricultural or commercial turbines

- Regulate with zoning:
 - Restrict to districts or municipal-wide
 - Setbacks
 - Sound
 - Special Use Permit (SUP)
- Regulate without zoning:
 - Site plan review



Climate Leadership and Community Protection Act (CLCPA)

Reduce greenhouse gas (GHG) emissions:

- 40% reduction by 2030
- Zero emissions from electricity by 2040

Increase renewable sources to 70% by 2030

Develop or support:

- 6000 MW of solar by 2025;
- 3000 MW of energy storage capacity by 2030
- 9000 MW of offshore wind by 2035.



Accelerated Renewable Energy Growth and Community Benefit Act Passed April 2020

Goals:

- To achieve the CLCPA targets in a timely manner
- Construction and creation of renewable energy facilities
 - Established streamlined and uniform permitting process under new Office of Renewable Energy Siting (ORES) within NYS Department of State (Executive Law § 94-c)

ORES Responsibilities and Timeline

- ORES, through its executive director, shall accept applications, evaluate, and issue siting permits for renewable projects
- ORES comprised of legal, environmental, and energy professionals.
- Uniform Standards and Conditions for siting, designing, engineering each class and category of renewable energy facilities
- Implements Executive Law § 94-c
- Processing of new applications by ORES under § 94-c should be completed within one year of its completeness determination

Major Renewable Energy Projects

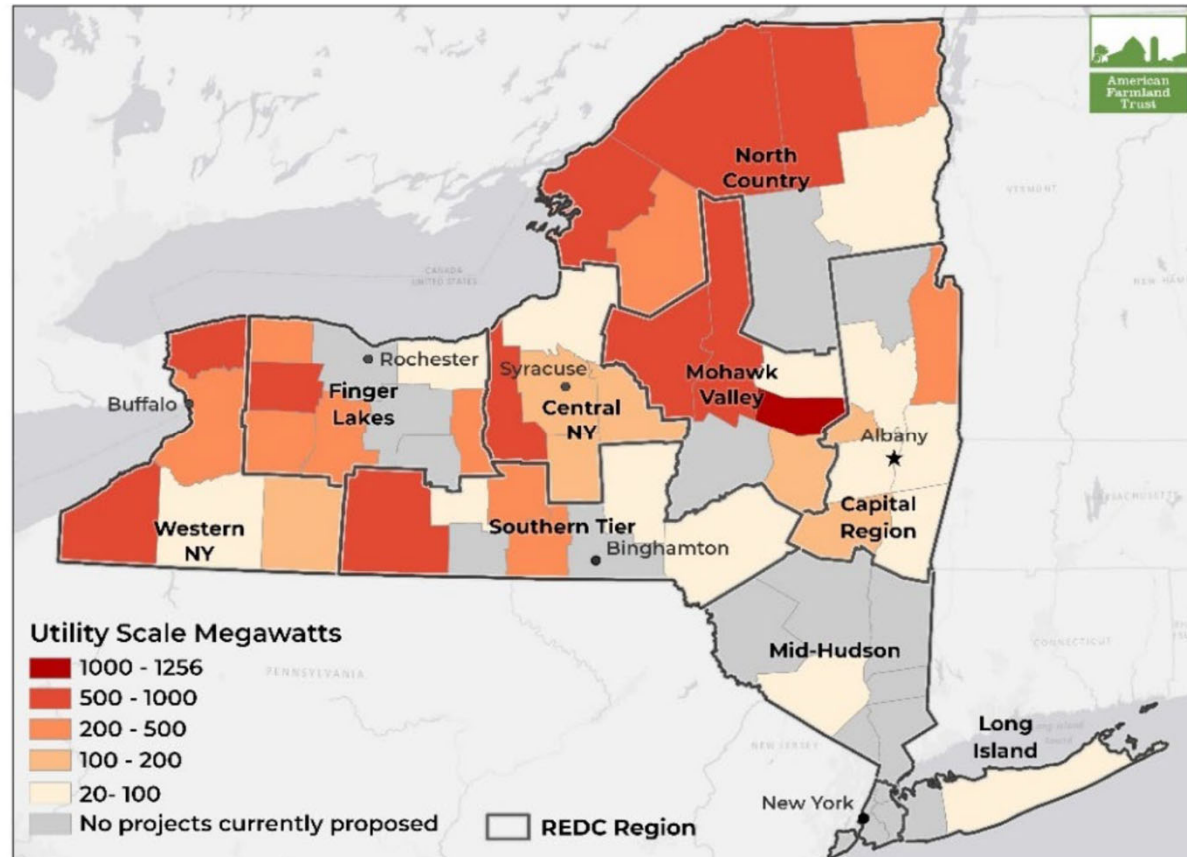
Who Reviews Projects?

- Projects under 20 mw: Local review
- Projects 20 mw to 24.9 mw: Local review or may opt in § 94-c
- New Projects 25 mw or more: § 94-c
- Current Article 10 Projects: § 94-c or Article 10

Proposed Largescale Solar, August 2021

In megawatts

From the American Farmland Trust's "Smart Solar Siting on Farmland: Achieving Climate Goals While Strengthening the Future for Farming in New York"



American Farmland Trust – Smart Solar Siting

Category	Initial Project Classification	Fee
Orange	Project facility area includes 25% or more actively farmed MSG 1-4 ; and > 30 acres MSG 1-4	Per-acre fee of 150% of cost of protecting farmland within impacted REDC region applied to project MSG 1-4 acres
Yellow	Project facility area includes 10-25% actively farmed MSG 1-4 ; and > 30 acres MSG 1-4	Per-acre fee of 100% of cost of protecting farmland within impacted REDC region applied to project MSG 1-4 acres
Green	Project facility area includes less than 10% actively farmed MSG 1-4	No mitigation fee

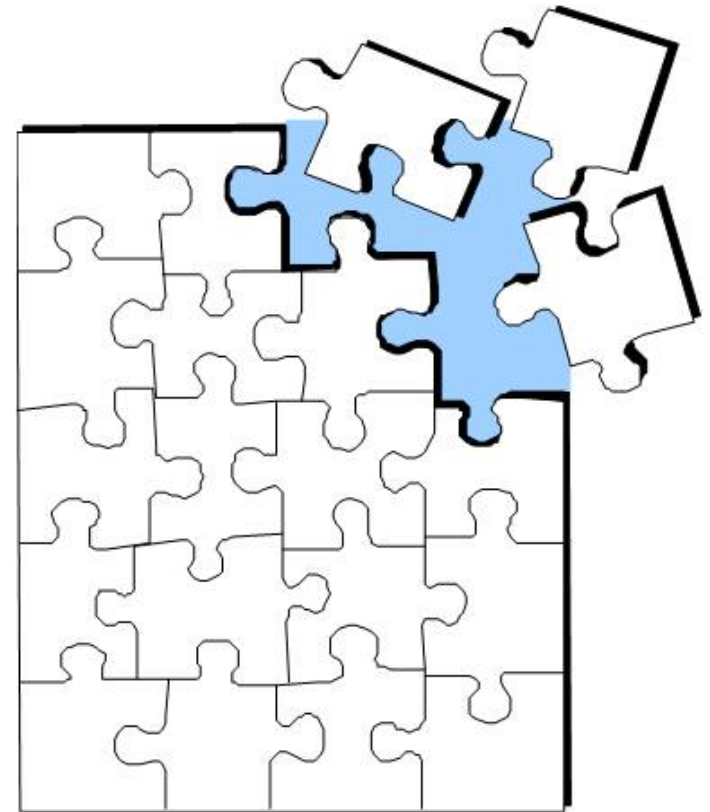
**Actively farmed land is defined as land that has been farmed at least one of the last five years*

Defending Your Decisions

The Record

Materials in the record tell the story of the application & typically include:

- Application & supporting documentation
- Newspaper notices
- Meeting minutes
- SEQR materials
- Public hearing testimony
- Written submissions from public
- Expert opinion
- Decision, conditions, findings



Findings

- Describe application's reasons for denial or approval
 - May support why conditions imposed
 - May support decision if challenged in court
- Conclusory statements (i.e., “standards were not met”) aren't “findings”
- Decision based on conclusory statements not supported by factual information in record will be struck down in courts

New York Department of State

Division of Local Government Services

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<https://dos.ny.gov/training-assistance>