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Municipal Law Seminar

Tuesday, April 30, 2024

The New York Voting Rights Act: Preclearance & Racially Polarized Voting

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April 30, 2024

Background

- The John R. Lewis New York State Voting Rights Act (N.Y. Elec. Law § 17-200 et seq.)
  - Encourage participation by all eligible voters to the maximum extent.
  - Ensure eligible voters from protected classes and language-minority groups have an equal opportunity to participate in political processes.
- Enacted June 20, 2022
- Response to Supreme Court decisions narrowing the federal Voting Rights Act
  - *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (2013); *Brnovich v. DNC*, 141 S.Ct. 2321 (2021)

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Overview

- Prohibition against Voter Disenfranchisement
  - N.Y. Elec. Law § 17-206(1)
- **Prohibition against Vote Dilution**
  - N.Y. Elec. Law § 17-206(2)
- **Preclearance Requirements for Covered Voting Policies**
  - N.Y. Elec. Law § 17-210
- Prohibition against Voter Intimidation, Deception, or Obstruction
  - N.Y. Elec. Law § 17-212

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Preclearance Requirement

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Preclearance Overview

- Effective Date: September 22, 2024
  - Only changes made on or after 9.22.24 will be covered.
- Any jurisdiction that is covered by the law's formula must submit any election change covered by the law for approval by the Civil Rights Bureau of the NYS Attorney General's Office ("CRB") or a State Supreme Court before it can take effect.

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Three Main Issues

- Three Main Issues:

1. Is the jurisdiction a covered entity?
2. Is the change a covered policy?
3. Does the change diminish the ability to participate in the political process and to elect candidates of choice?

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1. Covered Entities

Three types of covered entities:

i. Jurisdictions with prior voting or civil rights violations
   - Applicable Violations: Federal Voting Rights Act; NYVRA; 14th & 15th Amendments
   - Violations are court orders or government enforcement actions

ii. Counties where arrest rates are high among members of a particular race
   - The arrest rate must exceed the protected class's proportion of the citizen voting age population of the county by 20% based on NY Division of Criminal Justice Services statistics

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1. Covered Entities (cont'd)

"High rate of racial segregation"

iii. Jurisdictions with high rates of racial segregation in housing
   - Two-step analysis:
     - Population Prerequisite for each protected class per year: The jurisdiction must have either 25,000 citizens of voting age of the protected class or the protected class is at least 10% of the citizen voting age population.
     - Dissimilarity Index: Analyzes how evenly members of racial groups are distributed across neighborhoods within the past 10 years.
   - "High rate" = Dissimilarity Index above 50

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1. Covered Entities (cont'd)

Additional Considerations

- If a covered entity has a Board of Elections ("BOE"), the BOE is also a covered entity.
- If a covered entity is wholly within a larger jurisdiction, both the larger jurisdiction and its BOE are subject to preclearance only for changes affecting the covered entity.
- CRB Public Guidance lists covered entities as of 12/19/2023, including:
  - Erie, Monroe, Albany, & N.Y. Counties
  - Buffalo, NYC, Rochester, Albany, & Cheektowaga

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2. Covered Policies

- Examples of covered policies include changes to:
  - Election method
  - Form of government
  - Election dates, excluding special elections
  - Voter registration
  - Consolidation or division of political subdivisions
- CRB can add additional types of covered policies through the rulemaking process.

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3. Ability to Participate & Elect

- Preclearance will only be granted if the proposed change would not “diminish the ability of protected class members to participate in the political process and to elect their preferred candidates to office.”

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Preclearance Procedure

CRB ROUTE

Submission of Covered Policy

- Submit the covered policy to the CRB for preclearance review.

CRB Publication

- Within 10 days of receipt of the proposed covered policy, the CRB will publish the submission online and solicit public comments for: 5 days for changes to polling sites or assignment of districts to sites OR 10 days for all other changes.

CRB Decision

- Poll Site Decision: 15 days (with 20-day extension option)
- All Other Decisions: 55 days (with 180-day extension option)

Appeal

- Appeal of CRB decision via Article 78 in New York or Albany County State Supreme Court

Note

The CRB can grant "preliminary" preclearance for expedited decisions. CRB may deny preclearance within 60 days following receipt of a covered policy in an expedited circumstance.

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Preclearance Procedure

STATE SUPREME COURT ROUTE

Submission of Covered Policy

- Submit covered policy to designated court & provide necessary contemporaneous copies.
- Designated Courts:
  - 1st Judicial Dep't : N.Y. County
  - 2nd Judicial Dep't: Westchester County
  - 3rd Judicial Dep't: Albany County
  - 4th Judicial Dep't: Erie County
- Contemporaneous Copies to:
  - CRB
  - State BOE if covered entity is a county or city BOE

Court Decision

- Decision shall be rendered within 60 days of submission
  - Failure to decide within 60 days does not allow covered policy to be enacted

Appeal

- Pursuant to ordinary rules of appellate procedure

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Racially Polarized Voting Prohibition

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Overview

- Voter dilution prohibition focuses on:

1. **Racially polarized voting**
    a) "[V]oting in which there is a divergence in the candidate, political preferences, or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate."
    b) Differs from the federal VRA, which focuses on the extent of racial polarization. *See Flores v. Town of Islip*, 382 F. Supp. 3d 197, 236 (E.D.N.Y. 2019).
2. Totality of the Circumstances.

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Overview (cont'd)

Racially Polarized Voting

- Limits the types of evidence that the court can consider and how it should be weighed:
  - Weight:
    - Pre-action elections > Post-action elections
    - Elections for governing body of subdivision > all other elections
    - Statistical evidence > Non-statistical evidence
  - Cannot consider:
    - Partisanship or other factors explaining voting patterns
    - Protected class sub-groups' differing voting patterns

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Potential Remedies

- Alternative Voting Systems
  - Cumulative Voting
  - Ranked-Choice Voting
- District-based Elections
- New or Revised Districts
- Elimination of Staggered Elections
- Moving Election Dates to be Concurrent with State, County, or City Elections

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Litigation Procedure

Notification & Safe Harbor N.Y. Elec. Law § 17-206(6)

1. NYVRA Notification Letter
   - Prospective plaintiff cannot sue within 50 days after sending letter
2. NYVRA Resolution
   - Before receiving letter or within 50 days of letter's mailing, the subdivision may pass a resolution affirming:
     - Intent to remedy potential violation
     - Specific steps to implement remedy
     - Schedule for implementation
   - Prospective plaintiff cannot bring action within 90 days of passage

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Litigation Procedure (cont'd)

Notification & Safe Harbor N.Y. Elec. Law § 17-206(6)

3. Implementation of Remedy
   - Subdivision can enact pursuant to its own authority OR
   - Utilize statutory power of CRB to implement
4. CRB Implementation
   - Public hearing on NYVRA Proposal
   - Submit NYVRA Proposal to CRB
   - Preclearance not required
   - Within 45 days, CRB will grant or deny

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Litigation Procedure (cont'd)

Notification & Safe Harbor N.Y. Elec. Law § 17-206(6)

4. CRB Implementation (cont'd)
   - CRB will grant NYVRA Proposal if it concludes that:
     - Subdivision may be in violation of NYVRA
     - Proposal would remedy potential violation
     - Proposal unlikely to violate Constitution or federal law
     - Proposal would not diminish protected class members' ability to participate in political process and elect preferred candidates
     - Implementation is feasible
   - If denied, CRB must explain basis for denial and may propose alternative remedies.

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Additional Considerations

- Standing:
  - Any aggrieved person
  - Organization with aggrieved members of protected class
  - Voters' Rights Organization
  - Attorney General
- Attorneys' Fees:
  - NYVRA Letter -> Implemented Remedy -> prospective plaintiff can demand reimbursement for cost of work product
  - Successful Enforcement Action
    - Reasonable attorneys' fees, litigation expenses, expert witness fees

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Potential Defenses

- United States Constitution
  - First Amendment – freedoms of speech/association
  - Fourteenth Amendment – equal protection
  - Fifteenth Amendment – prohibition against race-based voting policies
- Federal Voting Rights Act of 1965 - preemption
- New York State Constitution, Article I
  - Section 6 – substantive due process
  - Section 8 – freedom of speech
  - Section 11 – equal protection

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Litigation to Date

- ***Serrato et al. v. Town of Mt. Pleasant et al.*, Index. No. 55442/2024 (Sup. Ct. Westchester Cnty. 2024)**
  - Racially Polarized Voting & Totality of Circumstances
- ***N.Y. Communities for Change et al. v. Cnty. of Nassau et al.*, Index. No. 602316/2024 (Sup. Ct. Nassau Cnty. 2024)**
  - Racially Polarized Voting & Totality of Circumstances
- ***Kenneth Young v. Town of Cheektowaga*, Index No. 803989/2024 (Sup. Ct. Erie Cnty. 2024)**
  - Racially Polarized Voting
- ***Oral Clarke et al. v. Town of Newburgh*, Index No. EF002460-2024 (Sup. Ct. Orange Cnty. 2024)**
  - Racially Polarized Voting & Totality of Circumstances

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Questions?

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Real Property Tax Law Update on Renewable Energy Projects: Assessments, Exemptions, and PILOT Agreements

Municipal Seminar
April 30, 2024

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Presented by:
Henry A. Zomerfeld, Esq.

Overview

- Real property tax treatment
  - What is taxable as real property?
    - Statutory scheme
    - Fixtures test
    - Case law
  - Real Property Tax Law (“RPTL”) § 575-b Methodology
  - Using the Model
  - RPTL § 487 exemption for renewable projects
  - Payment-in-lieu-of-taxes agreements

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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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Property Taxation: What's Taxable?

- As a general rule, "all real property within the state [is] subject to real property taxation, special ad valorem levies and special assessments unless exempt therefrom by law." RPTL § 300.
- In contrast to real property, personal property is generally not taxable. RPTL § 300.
- Under RPTL § 102(12)(b) "real property" includes: "Buildings and other articles and structures, substructures and superstructures erected upon, under or above the land, *or affixed thereto*, including bridges and wharves and piers and the value of the right to collect wharfage, cranage, or dockage thereon." RPTL 102(12)(b) (emphasis added).
- Also included as real property are ". . . lighting and power generating apparatus, shafting other than counter-shafting and equipment for the distribution of heat, light, power, gases and liquids, *but shall not include movable machinery or equipment consisting of structures or erections to the operation of which machinery is essential*, owned by a corporation taxable under article nine-a of the tax law, used for trade or manufacture and not essential for the support of the building, structure or superstructure, *and removable without material injury thereto*." RPTL § 102(12)(f) (emphasis added).
- The operative statutory language "other structures" that are "affixed" to the land under RPTL § 102(12)(b), and "moveable machinery" and "removable without material injury" under RPTL § 102(12)(f) are significant because a question that arises is whether the property at issue is a fixture.

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Fixtures Test

- A structure is “affixed” to the land when it meets the common-law definition of a fixture.
- “To meet the common-law definition of a fixture, the personalty in question must: (1) be actually annexed to real property or something appurtenant thereto; (2) be applied to the use or purpose to which that part of the realty with which it is connected is appropriated; and, (3) be intended by the parties as a permanent accession to the freehold.” *Matter of Metromedia, Inc. v. Tax Comm’n of the City of New York*, 60 N.Y.2d 85, 90 (1983) (internal citations omitted).

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Cornell University

- *Cornell University v. Board of Assessment Review and Assessor of the Town of Seneca, New York* (Ontario County Index No. 114235-2016) (Ark, J.).
- Cornell University brought a hybrid action under RPTL Article 7 and CPLR Article 78 challenging the real property tax assessment of a solar energy system maintained on its property, but owned by a third-party, Argos Solar, LLC (a non-party).
- Cornell made two primary arguments:
    1. Cornell is a tax-exempt educational institution; and
    2. The solar energy system is personal property, not real property, and therefore not taxable.
- The Town contended that Cornell's tax exemption was irrelevant because the solar energy system was owned by a non-tax-exempt third-party, Argos Solar.

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Cornell University

- The Court granted the Petition, along with costs under RPTL § 722(1).
- The Court's rationale in granting the Petition was two-fold:
  - First, the Power Purchase Agreement between Cornell and Argos expressly provided that the system "is not to be regarded as a fixture or otherwise part of the Premises or Solar Premises on which it may be located."
    - While not binding on the Town, this provision demonstrated the intent of Cornell and Argos concerning the System and whether it is affixed or moveable, which are relevant to the interpretation of whether the System is "real property" under the law. If the equipment constitutes "real property," it is taxable unless otherwise exempt.
  - Second, Cornell was tax-exempt. The ownership of the System by Argos Solar did not negate the tax exemption so long as the improvement is within or reasonably incidental to the exempt purpose.
    - Thus, even if the Court found the System was real property, and therefore taxable, Cornell's tax-exempt status would prevent taxation in this instance.

Cornell University on Appeal

- *Cornell Univ. v. Bd. of Assessment Review and Shana Jo Hilton, as Assessor of the Town of Seneca*, New York, 186 A.D.3d 990 (4th Dep't 2020), amended 188 A.D.3d 1692 (4th Dep't 2020), *lv to appeal dismissed in part, denied in part,* 36 N.Y.3d 1043 (2021).
- The Fourth Department reversed Supreme Court's decision.
- The Town prevailed in its argument that the system was a fixture—meeting all three elements of the test—and therefore was real property.
- The Court also held that *Cornell's* tax-exempt status as an educational institution was not relevant of the analysis.

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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).

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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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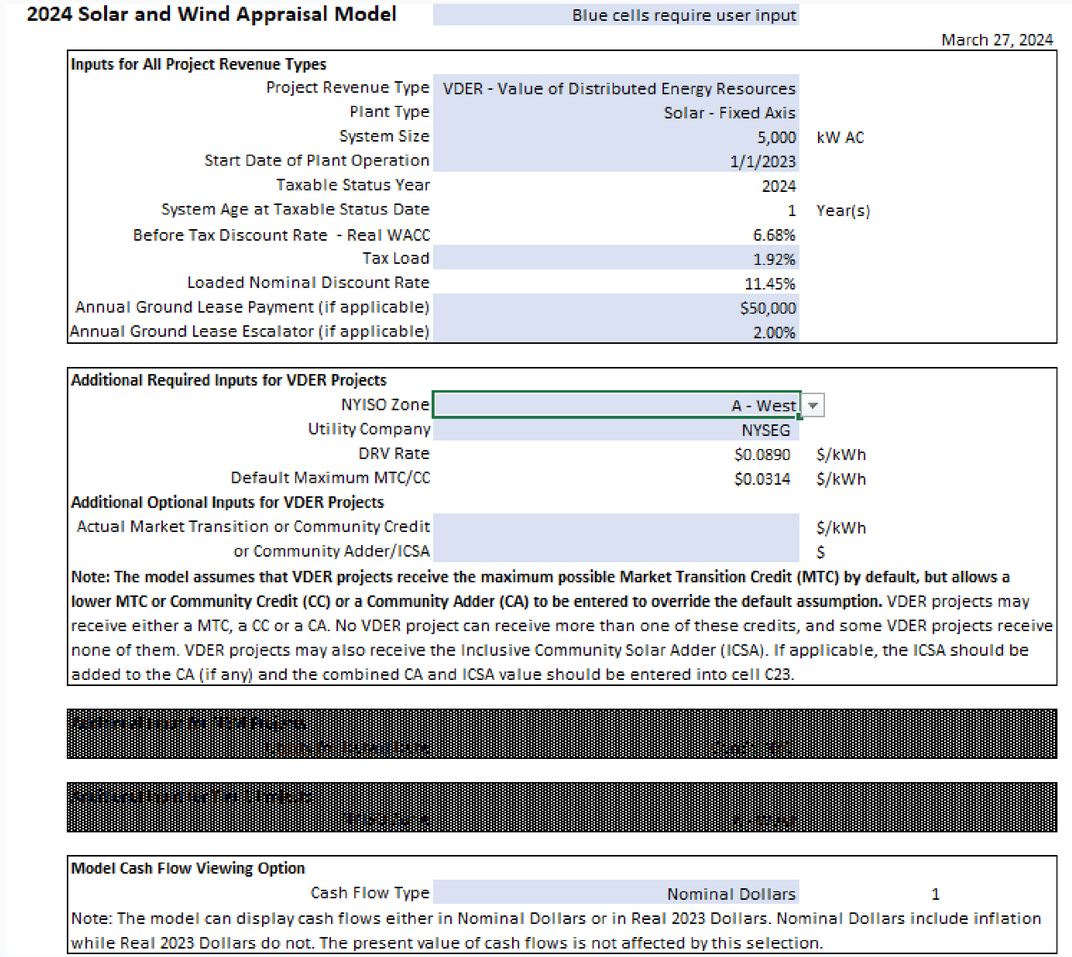
Using the Model



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]										
[redacted]										
[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	$ -	$ 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.

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
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Community Adder/ICSA	-	-	-	-	-	-	-	-	-	-
VDER Revenues Total	-	721,035	671,346	720,760	708,880	688,770	662,583	635,291	612,294	586,604
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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

Where do Assessors get the Inputs?

- **Requests have gone out to developers and owners of projects:**

Beginning with 2022 assessment rolls, Real Property Tax Law Section 575-b requires local assessors to use the methodology prescribed by the New York State Department of Taxation and Finance to value and place assessments on solar and wind energy systems with a nameplate capacity equal to or greater than one megawatt.

The Tax Department's appraisal model requires a few pieces of information from the developers of affected energy systems. Within 30 days, please complete the information below and return this letter to my office.

Thank you.

Assessor Name, Title
Town/City of _____
Address
Municipality, NY Zip
Telephone number
Email (optional)

System size: _____

NYISO zone (circle one): A.West B.Genesee C.Central D.North E.Mohawk Valley F. Capital G.Hudson Valley H.Millwood I.Dunwoodie J.New York City K.Long Island

Date of operation: _____

Annual ground lease payment (if none, enter 0): $_____

Annual ground lease escalator (if none, enter 0): _____%

Utility Company (circle one): Central Hudson ConEd (11:00 a.m. – 3:00 p.m.) ConEd (2:00 p.m. – 6:00 p.m.) ConEd (4:00 p.m. – 8:00 p.m.) ConEd (7:00 p.m. – 11:00 p.m.) National Grid NYSEG Orange and Rockland PSEG Long Island RGE

Community or Market Transition Credit (if none, enter 0): $_____

Community Adder (if none, enter 0): $_____

Signature: _____ **Date**: _____
Printed name: _____
Title: _____
Telephone: _____
Email:

What Happens if Developers do not Respond to the Assessor's Request for Information?

S5. If the developer fails or refuses to provide the necessary information for the model may the assessor use other valuation methods to develop a value?

You should make every effort to contact the developer for the necessary information. You may wish to use the Information request letter template.

If you have exhausted all avenues to collect the information from the developer, you may email renewables.model.questions@tax.ny.gov for help in determining typical estimates for the type of plant in your area.

Information from annual reporting under RPTL 575-a?
https://www.tax.ny.gov/pdf/current_forms/property/rp575.pdf
But what if protection sought from disclosure of annual reporting information under FOIL?

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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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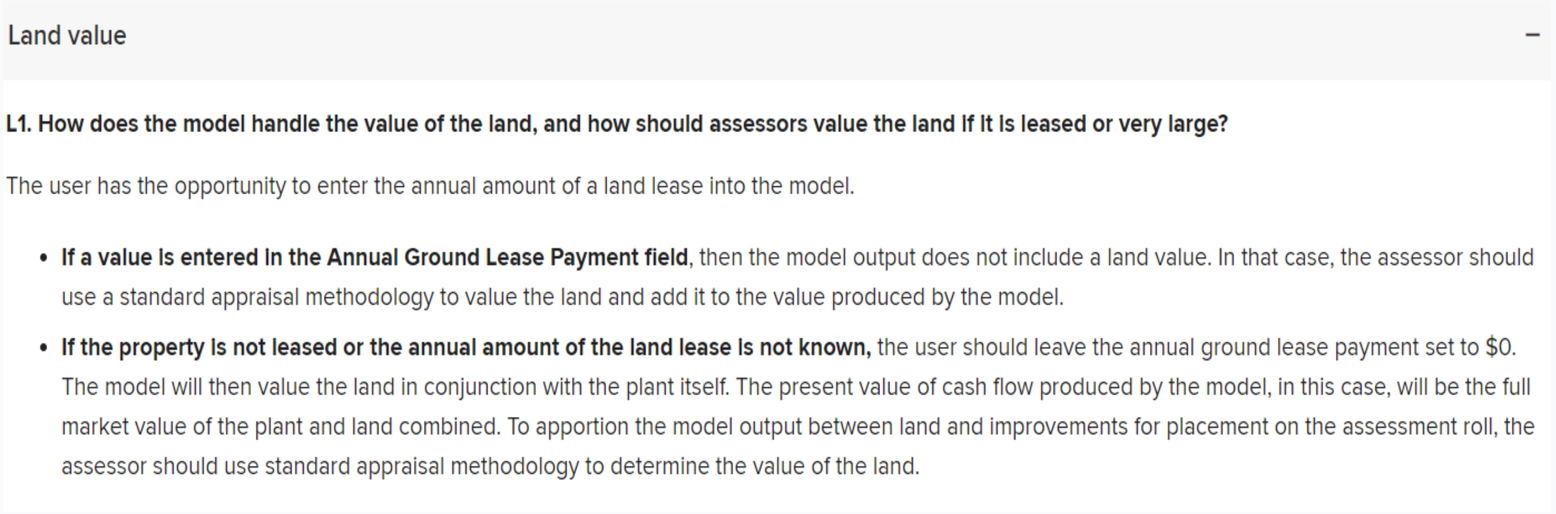
Unanswered Questions

- As assessors are required to provide both a total valuation and the land valuation in establishing the assessment rolls, it is not clear how the Model is to be implemented in this regard. DOTF guidance is inconsistent and unclear. For example:



Land value

L1. How does the model handle the value of the land, and how should assessors value the land if it is leased or very large?

The user has the opportunity to enter the annual amount of a land lease into the model.

- **If a value is entered in the Annual Ground Lease Payment field**, then the model output does not include a land value. In that case, the assessor should use a standard appraisal methodology to value the land and add it to the value produced by the model.
- **If the property is not leased or the annual amount of the land lease is not known,** the user should leave the annual ground lease payment set to $0. The model will then value the land in conjunction with the plant itself. The present value of cash flow produced by the model, in this case, will be the full market value of the plant and land combined. To apportion the model output between land and improvements for placement on the assessment roll, the assessor should use standard appraisal methodology to determine the value of the land.

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Unanswered Questions

- The Model is not a Uniform Standards of Appraisal Practice- compliant appraisal. How will the courts handle challenges?
- Can assessors and assessment review boards still settle cases via RPTL Article 5 grievance procedures?
- For projects involved in assessment challenge litigation, does the annual use of the Model constitute an update for purposes of the three-year freeze under RPTL § 727?

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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.

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Overview of the RPTL § 487 Exemption (cont'd)

- Does not exempt these systems from special assessments or ad valorem levies.
- Municipalities and School Districts may opt out of the exemption.
  - To opt out, a local law, ordinance, or resolutions must be filed with the commissioner of the NYS Department of Taxation and Finance and the president of NYSERDA. Make assessor aware, too.
  - A local government that does not opt out can still benefit financially through payment-in-lieu-of-taxes ("PILOT") agreements.

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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Typical PILOT Agreements

1. Payment per megawatt, not assessed value or actual production.
2. Terms of payment.
3. Adjustments for system changes.
4. Assignment clause.
5. Defense/indemnification provisions.
6. Remedies on default.
7. Termination conditions.
8. Payment of school district costs to negotiate PILOT.

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Opt Outs

"[A] county, city, town or village may by local law or a school district . . . may by resolution provide . . . that no exemption under this section shall be applicable within its jurisdiction with respect to any micro-hydroelectric energy system, fuel cell electric generating system, micro-combined heat and power generating equipment system, electric energy storage equipment or electric energy storage system, or fuel-flexible linear generator electric generating system constructed subsequent to [1/1/1991] or the effective date of such local law, ordinance or resolution, whichever is later. A copy of any such local law or resolution shall be filed with the commissioner and with the president of the authority." RPTL § 487(8)(a)(ii) (ellipses and brackets added).

Impact of Opting Out

1. Some local governments are opting out of RPTL § 487 so they can tax renewable energy projects that would otherwise qualify for the exemption.
2. However, jurisdictions that opt out may find that they will not actually collect more tax revenue from qualifying energy systems because the systems may not be built if they are fully taxable.
3. If a municipality opts out, it is effectively disallowing the exemption to renewable energy systems where construction had not begun by the effective date of the applicable local law, ordinance, or resolution.
4. Opting out affects all projects; jurisdictions cannot conditionally opt out of certain projects, but not others.
5. Jurisdictions that opt out can choose to reinstate the exemption by repealing the local law, ordinance, or resolution.

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Laertes Solar

- *Laertes Solar, LLC v. Board of Assessment Review and Assessor of the Town of Harford, New York, et al.* (Cortland County Index No. E17-1018) (Guy, A.J.)
- Laertes Solar brought an Article 78 and declaratory judgment action challenging the real property tax assessments of a solar energy system constructed by Laertes Solar and placed on Cornell University's property.
- In May of 2014, the School District adopted a resolution opting out under RPTL § 487.
- Significantly, the School District never filed the resolution with the president of NYSERDA until several years later, after the System was completed.
- The parties agreed that RPTL § 487 provided certain energy systems with a tax exemption and that the statute applied to the energy system at issue.
- The primary argument raised was that the System was exempt from real property taxes because the Dryden School District did not properly opt out from the RPTL § 487 exemption.

Laertes Solar

- Under RPTL § 487(8)(a), no exemption is allowed when the system is “constructed subsequent to . . . The effective date a local law, ordinance or resolution . . .” is adopted. The late-filed resolution had no effect on the System here.
- However, the respondents claimed that the School District’s opt out was effective, and even if it was not, Laertes Solar needed to pursue a PILOT agreement as a prerequisite to qualify for the exemption under RPTL § 487.

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Laertes Solar

- The Court began by holding that the System was taxable unless exempt under the law.
- The Court dismissed the argument about the PILOT agreement. All RPTL § 487(9) provides is that the taxing authority "*may* require" the owner of a solar energy system to enter into a PILOT agreement. And that applies only to a jurisdiction that *did not* opt out.
- The Court held that the School District's failure to adhere to the strict filing requirements meant that the School District did not opt out during the relevant time period. Therefore, the Court granted the Petition.
    - In doing so, the Court found Laertes Solar entitled to the RPTL § 487 exemption, voided the property tax bill, and directed refunds from the School District.
    - However, the Court limited its holding to that issue, explicitly stating that no findings were made with the other tax exemption argument raises under RPTL § 404 (state-owned property) and RPTL § 420-a (non-profit organizations).

Laertes Solar on Appeal

- Third Department affirmed Supreme Court's decision. *Matter of Laertes Solar, LLC, et al. v. Assessor of the Town of Harford, et al.*, 182 A.D.3d 826 (3d Dep't 2020).
- For RPTL § 487 opt out to be effective, plain language of stature requires filing with DOTF and NYSERDA. RPTL § 487(8)(a).
- Additionally, 60-day clock for a taxing jurisdiction to demand PILOT starts running upon written notice. RPTL § 487(9)(a).
- Aside: A jurisdiction that opted out cannot demand a PILOT agreement. RPTL § 487(9)(a).

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Questions?

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Real Property Tax Law (RPTL) Update

Hodgson Russ LLP ATTORNEYS

April 30, 2024

Michael B. Risman, Esq.

Municipal Law

I. Update on Legislative Changes Relating to Real Property Tax Law ("RPTL")
   A. Exemptions for Senior Citizens and Persons with Disabilities
      1. RPTL §§ 467 and 459-c
      2. Applicant's income must be determined based upon Federal adjusted gross income on tax returns
      3. Some adjustments discretionary on part of Town (*e.g,* IRA distributions, social security benefits)

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B. Retroactive Exemptions for Specific Properties

1. Assessor can accept exemption application <u>after</u> taxable status date for certain not-for-profit and governmental property acquired after taxable status date.

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C. Agricultural Exemption — Tree Nuts

1. “Tree Nuts” considered a “fruit” for purposes of agricultural exemption
2. AML §301

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D. Solar and Wind Systems
   1. RPTL §575-b
   2. Tax Department Valuation Model adopted

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E. First-Time Home Buyers Exemption
    1. RPTL § 485
    2. Extended to 12/31/28
    3. Municipality may elect to provide

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F. Senior Citizens and Persons With Disabilities
    1. Exemption income limits increased
    2. Was $29,000
    3. Now sliding scale up to $50,000
    4. Discretion of municipality or school district
    5. RPTL §§ 467(3)(a) and 459-c(5)(a)

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G. Senior Citizens Exemptions
   1. RPTL 467(4)
   2. Municipality must send two notices — not one — advising of availability of exemption

Municipal Law

H. Volunteer Firefighters and Ambulance Workers Exemption
   1. RPTL § 466-a
   2. State-wide option
   3. Municipalities, school districts, and fire districts
   4. Up to 10% property tax exemption

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5. Must live in district served
6. Minimum service requirements — 2 to 5 years
7. Lifetime exemption — 20 years' service
8. Spouses of deceased eligible volunteers can retain exemption

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I. Real Property Actions and Proceedings Article 19B

1. Acquisition of title by municipality
2. Abandoned commercial or industrial property
3. Vacant, unprotected
4. Unpaid taxes for more than year
5. Special proceeding can be commenced

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J. Telecommunications Assessment Ceilings

1. RPTL §499-pppp
2. Extended to January 1, 2027
3. Telecom property taxable as a result of *T-Mobile* case
4. Ceilings set annually by ORPTS

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K. IDA PILOT

1. Notice must be sent to taxing jurisdictions two years before PILOT expires
2. Notice of deviation from Uniform PILOT Policy must be sent by certified mail
3. General Municipal Law
   Article 18-A — Sections 850, *et seq*.

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L. Valuation — Comparable Sales
   1. RPTL § 305-a
   2. Comparable sales must be similar use and same real estate market
   3. Applies to comparable sales approach and income approach to property valuation
   4. Overrides “dark store” theory used by Big Box stores

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M. RPTL §305-a Statute — Assessment using the comparable sales, income capitalization or cost method

- As used in this section, the following terms shall have the following meanings:

  (a) "Mixed-use property" means a property with a building or structure used for both residential and commercial purposes.

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(b) “Non-residential property” means a property with a building or structure used for commercial purposes.

2. When determining the value of a mixed-use property using the comparable sales, income capitalization or cost method, the following shall be considered when selecting appropriate sales or rentals comparable to the subject property; provided, however, that the following requirements shall apply only to assessing units other than cities having a population of one million or more:

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(a) sales or rentals of properties exhibiting similar use at the time of sale in the same real estate market. Comparable properties should include properties located in proximate location to the subject property unless there is an inadequate number of appropriate sales or rentals within the same market; and

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(b) sales or rentals of properties that are similar in age, condition, use or the use at the time of sale, type of construction, location, design, physical features and economic characteristics including but not limited to similarities in occupancy and market rent.

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M. Solar Project PILOT Agreements
   1. RPTL § 487(a)
   2. Requires 60-day letter to clearly state PILOT must be requested within 60-day time limit or waived

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II. Real Property Tax Law Case Law Update

- *Tyler v. Hennepin County, Minnesota*
  598 U.S. § 31 (2023)
  - In public tax foreclosure case, municipality cannot keep surplus money bid above taxes owed
  - Can deduct expenses from surplus
  - Erie County and City of Buffalo — surplus money procedure

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B. *Trustees of Masonic Hall & Asylum Fund v. Town of Henrietta* (4th Dep't 2023)

1. Masonic Lodge services constitute charitable tax-exempt purpose under RPTL §420-a
2. Even if property vacant, still tax-exempt if construction of buildings and improvements contemplated in "good faith"
3. No revenue derived from vacant land

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C. *Loyal Order of the Moose 1421 v. Town of Babylon*
216 A.D.3d 1159 (2d Dep't 2023)

1. Fraternal organization exempt under 501(c)(8) — not 501(k)(3) — is not exempt under RPTL 420-a or 420-b

Municipal Law

D. *County of Westchester and Standard Amusements, LLC v. City of Rye* (S. Ct., Westchester Co., 2023)

1. Public park owned by County who entered into 30-year management agreement with a for-profit hedge fund ruled still entitled to tax-exempt status even though hedge fund will keep profits from operating the playground
2. Property still owned and used for exempt purpose
3. Compare *Bills Stadium* and *Nassau County Coliseum* cases

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E. *SLIC Network Solutions, Inc. v. New York State Dept. of Taxation and Finance*, 223 A.D.3d 1126 (3d Dep't 2024)

1. Under *T-Mobile v. Northeast v. DeBellis* decision, all telecommunications property, including fiber optic cable, is taxable real property unless used primarily or exclusively for cable TV since they pay franchise fees to municipalities — 5% of gross revenues

Municipal Law

2. Cable TV provider with 14 municipal cable TV franchises in North Country ruled that it failed to meet burden that it was primarily cable TV provider due to also providing internet and telephone signals.

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F. *Cuzson Associates v. Village of Spring Valley*, 221 A.D.3d 896 (2d Dep't 2024)
   - Third Department ruled and reaffirmed that Supreme Court has broad discretion to order discovery, production of documents, and information needed to prepare appraisal pursuant to CPLR § 408.

Municipal Law

G. *Lost Lake Resort, Inc. v. Town of Forestburgh*, 222 A.D.3d 1091 (3d Dep't 2024)

1. Actual recent sale price of large vacant land parcel is binding as to market value.
2. Full market value of property to be developed by analyzing value of subdivided lots is wrong valuation methodology.

Municipal Law

H. *Coscia v. Town of Cheektowaga*, 222 A.D.3d 49 (2d Dep't 2024)

1. Proceeding commenced prematurely shortly before thirty-day window to file Article 7 under RPTL § 702(2) ruled untimely.

Municipal Law

I. *Tax Equity Now NY, LLC v. City of New York*, New York Court of Appeals, March 1, 2024

1. Lawsuit challenging entire New York City real property tax system states cause of action under RPTL § 305(2) — all real property must be assessed using uniform percentage of value — and Federal Fair Housing Act, 42 U.S.C. § 3601, et seq. — discriminatory disparate impact on certain protected classes of New York City property owners.

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SEQRA Basics and Common Pitfalls to Avoid

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Municipal Seminar 2024

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Alicia R. Stoklosa, Esq.

April 30, 2024

Agenda

- SEQRA basics
- Common SEQRA pitfalls
- Best practices for SEQRA compliance

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What is “SEQRA”?

- Law Ch. 43, Consolidated Laws of NYS
- Regulations are Part 617 of Title 6 of the New York Codes, Rules and Regulations (“6 NYCRR”)
- Information resources on DEC website http://www.dec.ny.gov/permits/357.html

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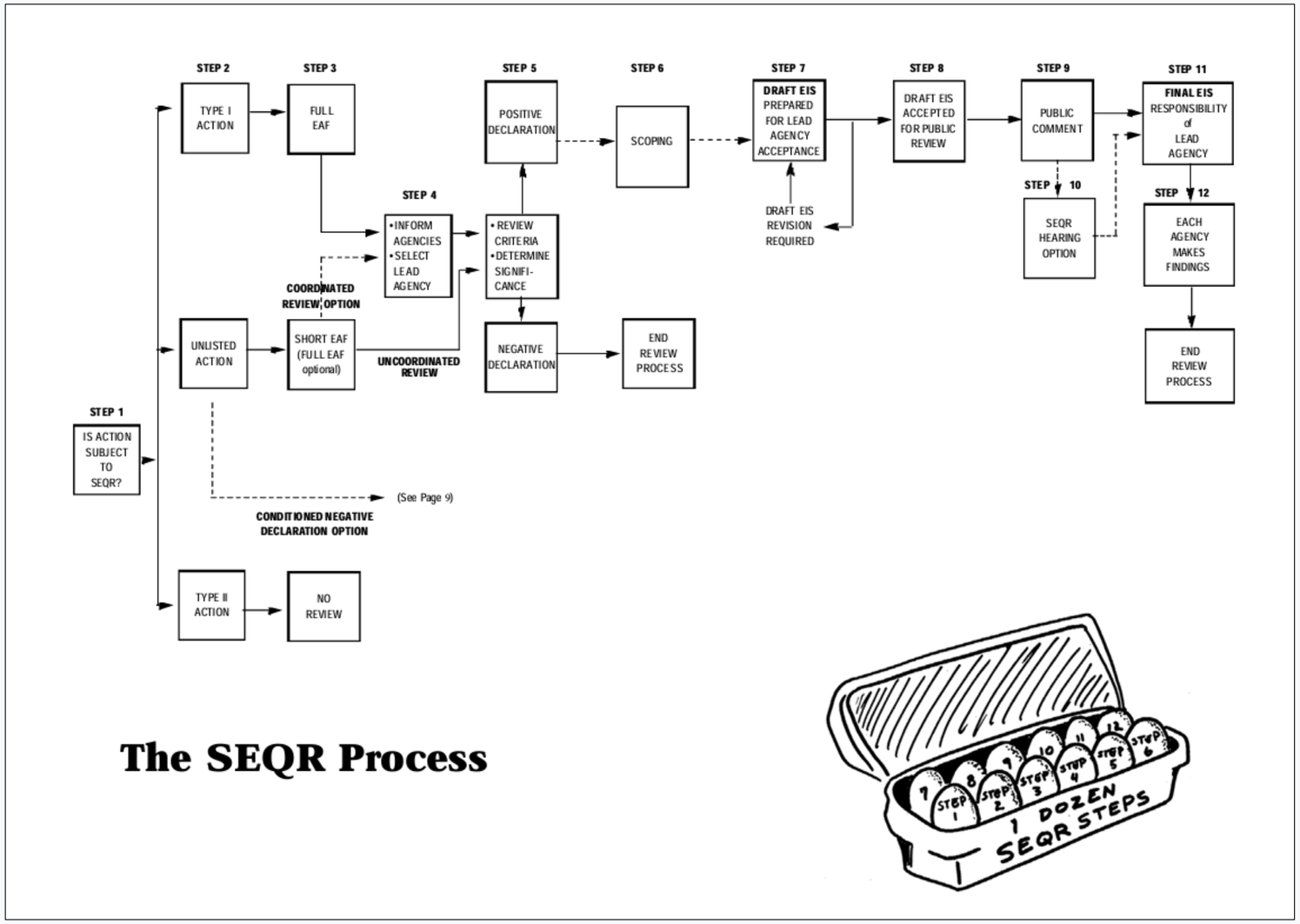
Stepping through SEQRA



https://extapps.dec.ny.gov/docs/permits_ej_operations_pdf/cookbook1.pdf

SEQRA Process Overview

- Classify – Type I, Type II, or Unlisted
  - Check DEC and agency designations
  - Type I – more likely to have a significant adverse impact
  - Type II – no significant adverse impact
  - Unlisted – Not Type I or II - requires determination of significance and may require a DEIS
- Complete the corresponding Environmental Assessment Form
  - Type I requires the Full EAF – Part 1 by applicant, Parts 2 and 3 by lead agency
  - Type II never requires a determination of significance or a DEIS
  - Unlisted usually warrants short EAF but lead agency can decide to require full EAF to fully analyze impacts

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SEQRA Process Overview

- Coordinate review
  - Type I (requires coordinated review)
    - Involved agency receiving initial application circulates to other involved agencies
    - Lead agency will be determined within 30 days – otherwise DEC will designate
  - Unlisted
    - If a DEIS is required, coordinated review
    - Uncoordinated review is allowed, but if one agency determines there may be a significant adverse environmental impact, must coordinate

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SEQRA Process Overview

- Determine Significance
  - If SIGNIFICANT:
    - Scope Draft Environmental Impact Statement (DEIS) – must identify significant issues and contain the items identified in 6 NYCRR 617.8(e). Within 60 days of receipt of the draft scope, the lead agency must supply a final written scope to the applicant, involved agencies, and individuals who expressed written interest.
    - Prepare DEIS – must contain the items identified in 6 NYCRR 617.9(b)(3).
    - Accept or return/revise DEIS – the lead agency has 45 days to accept or return the DEIS, and 30 days on any subsequent DEIS submittals.
    - Public comment period – lead agency issues Notice of Completion (see 6 NYCRR 617.12) and publishes DEIS online. Public comment must be open at least 30 days. SEQR does not require a public hearing, but local law might.
    - Prepare Final EIS – must include DEIS, revisions, supplements, and comments with lead agency response.

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SEQRA Process Overview

- Findings Statement
  - Each involved agency must prepare its own written findings statement after the Final Environmental Impact Statement (FEIS) is filed and before the agency makes its discretionary determination.
  - A positive findings statement means that the project or action is approvable after consideration of the FEIS and demonstrates that the action chosen is the one that avoids or minimizes adverse environmental impacts and weighs and balances them with the social, economic and other considerations.
  - A negative findings statement means the project cannot be approved and must document the reasons for the denial.
  - The findings can be finalized no sooner than 10 days following the Notice of Completion of the FEIS. The lead agency's findings must be made within 30 days of the filing date.
  - Findings of each agency must be filed with all other involved agencies and the applicant at the time they are adopted.

Common SEQRA Issues and Pitfalls

SEQRA Issue #1

- Failure to take the required “hard look” at all environmental impacts.

“Hard Look” and Judicial Review

- A lead agency’s SEQRA determination will be upheld so long as the agency:
  - (1) takes a “hard look” at the relevant environmental concerns raised during the review and
  - (2) provides a “reasoned elaboration” for its decision
- What constitutes a “hard look” is highly litigated
- Courts will look at the agency’s review to ensure the determination was not arbitrary, capricious, or unsupported by the record
- This review is deferential

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“Hard Look” and Judicial Review

- *Elizabeth Street Garden, Inc. v. City of New York*, 217 A.D.3d 599 (1st Dep’t 2023)
- NYC Dep’t of Housing Preservation and Dev. (HPD) issued a negative declaration for a proposed low-income senior housing development
- Why the court found HPD took a hard look:
  - As to the impact on open spaces, HPD examined the study area at length
  - As to neighborhood character and cumulative impacts, conducting only a preliminary assessment was fine since no significant impacts were found

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“Hard Look” and Judicial Review

- *Boyd v. Cumbo*, 210 A.D.3d 762 (2d Dep’t 2022)
- NYC Dep’t of City Planning (DCP) issued a negative declaration for a proposed rezoning to develop certain properties in Brooklyn
- Why the court found DCP took a hard look:
  - Since the development was less than 400 residential units, which is the threshold for a preliminary infrastructure analysis under the CEQR Technical Manual, DCP found there was no potential adverse impact related to water and sewer infrastructure

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SEQRA Issue #2

- Failure to provide a written, reasoned elaboration for agency determination on application(s).

- The lead agency must "set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation." 6 NYCRR 617.7(b)(4).

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Drafting a Reasoned Determination

- State whether the agency found each potential impact likely, significant, or neither
- Describe mitigation included in the project plans
- Name sources relied on to reach conclusions
- Explain how cited sources support conclusions

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Drafting a Reasoned Determination

- *Peterson v. Plan. Bd. of City of Poughkeepsie*, 163 A.D.3d 577 (2d Dep't 2018)
  - Petitioners challenged a negative declaration regarding proposed development adjacent to a historic district. City Planning Board *did* provide a written elaboration, but it was unreasonable and not supported by the record.
- *Rochester Eastside Residents for Appropriate Dev., Inc. v. City of Rochester*, 150 A.D.3d 1678 (4th Dep't, 2017)
  - Petitioners challenged the City of Rochester Director of Planning and Zoning's negative declaration regarding the proposed construction of an ALDI supermarket because there was known, undisputed presence of soil contamination on the site that was not addressed in the negative declaration.

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SEQRA Issue #3

- Final determinations inconsistent with agency findings and/or the evidence in the record.

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Denial after Negative Declarations

- Permissible - issuance of a negative declaration does not automatically require an agency to approve an action
- BUT, an agency may not make findings under SEQRA and then contradict and ignore those findings when denying the underlying application
  - *Matter of Kinderhook Dev., LLC v. City of Gloversville Planning Bd.*, 88 A.D.3d 1207 (3d Dep't 2011) (municipal board cannot render findings upon a negative declaration and then reverse itself on similar issues in support of a denial)

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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 the criteria set forth in the zoning law have been met.

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Specially Permitted Uses

- *Tampone v. Town of Red Hook Planning Bd.*, 215 A.D.3d 859 (2d Dep't 2023)
- Respondents applied for a special use permit and site plan approval, which were granted – Petitioners filed an Article 78 Petition to challenge the approval.
- The Planning Board found the application complied with the relevant requirements of the zoning code and demonstrated it considered the relevant criteria when reviewing the application.

SEQRA Issue #4

- Failure to comply with the Open Meetings Law ("OML")
- The purpose of the OML is to prevent municipal boards from privately debating and deciding matters in private which must be discussed and acted upon in public.
- If the OML is violated, the remedy is not immediate nullification of the action – the action is voidable *upon good cause shown*.

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OML Requirements

- On November 8, 2021, Governor Hochul signed Chapter 587 of the Laws of 2021 which amended the OML and requires public bodies that maintain a website to ***post meeting minutes on its website*** within two weeks of the date of the meeting, or within one week of an executive session.
- On October 19, 2021, Governor Hochul signed Chapter 481 of the Laws of 2021 which amends OML §103(e) to require that records to be discussed at an open meeting be made available, to the extent practicable:
  - Upon request; and
  - Posted online at least 24 hours before a meeting if the public body maintains a website.

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SEQRA Issue #5

- Improper segmentation/misapplying the concept of segmentation.

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Segmentation

- Segmentation is contrary to the intent of SEQRA, but not illegal per se.
- Review may be segmented if:
  - Information on future project phase is too speculative
  - Future phase may not occur
  - Future phase is functionally independent of current phase

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Segmentation

- *Adirondack Historical Assn. v. Village of Lake Placid/Lake Placid Village, Inc.*, 161 A.D.3d 1256, (3d. Dep't, 2018)
- The Village issued a negative declaration for its eminent domain acquisition of property needed for a redevelopment project.
- Petitioner challenged on the grounds of segmentation and failure to take a hard look at traffic impacts.
  - Not segmentation. The Village did not include this particular acquisition in its overall SEQR review because it did not anticipate the need for eminent domain.
  - BUT, no hard look. No evidence in the record or written elaboration that the traffic issues raised at public meeting and in written comment were considered or addressed. Court annulled the negative determination because this was a separate review with a separate record that provided no evidence for these conclusions.

Best Practices for Municipalities

- Compliance with SEQRA is critical to protecting municipalities from Article 78 proceedings
- The concept of “too much paper” does not exist
  - A decision is only as good as the backup documentation
  - Establish the “hard look”
  - Provide concise reasoning for decisions
- Take advantage of escrow arrangements
- Utilize your municipal website
- Develop forms and standards and be consistent

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SEQRA Resources

- SEQR Handbook - https://extapps.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf
- Stepping through the SEQR Process - https://dec.ny.gov/regulatory/permits-licenses/seqr/stepping-through-process
- Environmental Assessment Form Workbooks – https://dec.ny.gov/regulatory/permits-licenses/seqr/eaf-workbooks
- SEQR Cookbook - https://extapps.dec.ny.gov/docs/permits_ej_operations_pdf/cookbook1.pdf
- SEQR Flowchart - https://extapps.dec.ny.gov/docs/permits_ej_operations_pdf/seqrflowchart.pdf

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2024 Municipal Law Conference

LABOR AND EMPLOYMENT UPDATE

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April 30, 2024

Presented by:

Peter C. Godfrey and Jeffrey F. Swiatek

Labor and Employment Update

- Employee Discipline
- Employee Social Media Use
- Reorganization/Downsizing
- Collective Bargaining

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Employee Discipline – Revisions to Section 75

- N.Y. Civil Service Law § 75 provides disciplinary protections for various classifications of public employees.

- Historically, Section 75 has authorized the employer to appoint the hearing officer.

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Employee Discipline – Revisions to Section 75

- Section 75 has been recently amended to provide for independent hearing officer selection for the discipline of firefighters (L.2022, c.674).

- Subsequent legislation was vetoed (12/22/2023) to extend the independent hearing officer provisions to virtually all other public employees (A.3748/S.1039).

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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).

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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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Employee Discipline - Standards

- "Just cause" – A test of whether the employer acted reasonably in discharging or disciplining the employee.
- Did the employer establish a clear rule of conduct/performance?
- Was the rule reasonable?
- Was there a proper investigation?

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Employee Discipline - Standards

- Was there substantial credible evidence of wrongdoing?
- Was the penalty imposed reasonably related to the seriousness of the offense and the employee's past work record?
- Has the rule been evenly enforced?

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Employee Discipline – Best Practices

- Focus on facts, not conclusions.
- Let the employee tell his/her side of the story (“Loudermill” rights).
- Assess the risk (legal review of protected status, etc.).
- Effective post-termination procedures.

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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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First Amendment Protections

- Public sector employees have greater, but still limited, First Amendment protections in the workplace.
- 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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First Amendment Protections

- Even if the employee is speaking as a private citizen on a matter of public concern, “the interests of the [employee] as a citizen, in commenting on matters of public concern” must be balanced against “the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education of the Township High School District 205, Will County*, 391 U.S. 563 (1968).

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Employee Social Media Personal Account Information

- Under new Section 201-i of the Labor Law, employers are prohibited from requesting or requiring employees or applicants from disclosing any username, password, or other authentication information for accessing a personal account through an electronic communications device.
- Employers are also prohibited from requiring the employee or applicant to access a personal account in the presence of the employer.
- A “Personal Account” is an account or profile on an electronic medium where users may create, share, and view user-generated content that is used by an employee or applicant exclusively for personal purposes.

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Employee Social Media Personal Account Information

- Employers may require an employee to disclose log-in credentials for accessing:
- Non-personal accounts that provide access to the employer's internal computer or information systems.
- Accounts provided by the employer and used for business purposes where the employee was given prior notice of the employer's right to request such information.
- Accounts known to the employer to be used for business purposes.
- A device paid for in whole or in part by the employer where the payment was conditioned on the employer's right to access such device and the employee explicitly agreed. Personal accounts on such a device may still not be accessed.
- The law does not apply to any law enforcement agency, fire department, or department of corrections and community supervision.

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DOWNSIZING

- A public employer generally has no obligation to bargain with respect to a decision to reduce or abolish a service (*School District of New Rochelle, 4 PERB* ¶3060):

> *"a public employer exists to provide certain services to its constituents, be it police protection, sanitation or . . . education. Of necessity, the public employer, acting through its executive or legislative body, must determine the manner and means by which such services are to be rendered and the extent thereof, subject to the approval or disapproval of the public so served, as manifested in the electoral process. Decisions of a public employer with respect to the carrying out of its mission, such as a decision to eliminate or curtail a service, are matters that a public employer should not be compelled to negotiate with its employees."*

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DOWNSIZING

- The courts have been reluctant to intervene in decisions involving the reduction or abolition of services (*e.g., Richmond Hill Block Assn. v. Dinkins, 149 Misc.2d 654 [1991]["The management and operation of municipal government, which requires decisions regarding the quality and quantity of municipal services, should not be preempted by the judiciary but left in the control of duly elected officials."]*).

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DOWNSIZING

Civil Service Law Requirements:

- The standards and procedures for a layoff, and the rights of those subject to layoff, *may* be governed by applicable rules established by the civil service commission having jurisdiction over the municipality.
- An employee laid off may have the following rights:
    - vertical bumping
    - retreat
    - preferred eligible list rights

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LAYOFFS

- N.Y. Civil Service Law § 80 has historically governed the layoff of competitive class employees in the public sector.
- Section 80 was recently amended to extend that protection to non-competitive and labor class employees (L.2023,c.676,§1).
- Many collective bargaining agreements contain provisions that address layoff of non-competitive and labor class employees.

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DOWNSIZING CONSIDERATIONS

Other Possible Limitations:

- Express employment agreements (*e.g.*, employment contracts).
- Implied and quasi-contractual obligations (*e.g.*, employee handbooks, personnel manuals, policy statements, past practices, and certain oral representations).
- Collective negotiations agreements.

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DOWNSIZING CONSIDERATIONS

Further considerations:

- Discrimination claims
- Retaliation claims
- Defamation and name-clearing hearings
- Retirement incentives

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REORGANIZATION

Reorganization of Positions:

- Qualifications for appointment and continued employment are management decisions and are not mandatorily negotiable.

- Organizational structure is a management prerogative and is not mandatorily negotiable.

- Staffing levels and the level of services to be provided are non-mandatory.

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REORGANIZATION

Reorganization of Positions (con't):

- The content of job descriptions and establishment of essential duties, functions and related tasks of a position are non-mandatory management decisions.
- However, the performance of duties not within the inherent nature of employment of the position is a mandatory subject of bargaining. Employee workload is also a mandatory subject.

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PRIVATIZATION

- A public employer generally has a management right to determine whether to have work performed by public employees or by using outside contractors.
- However, that right can be limited either (a) by a collective bargaining agreement or (b) through the improper practice procedures of the Public Employment Relations Board ("PERB").

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PRIVATIZATION

Contractual Limitations:

- Subcontracting standards and limitations are mandatory subjects of bargaining under New York's *Taylor Law*.
- Many bargaining contracts include specific prohibitions against subcontracting, such as:

  "The Town shall be prohibited from subcontracting any Town work performed by members of this bargaining unit."
- Also look out for indirect contractual limitations, such as:

  "During the term of this Agreement, the Village shall not diminish any of the rights currently enjoyed by unit members.

  "The City shall continue all practices currently in effect."

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PRIVATIZATION

PERB Limitations:

- PERB, through its improper practice procedures, can prohibit subcontracting of work if:

  (a) the work has been exclusively by bargaining unit members; and

  (b) the reassigned tasks are substantially similar to those previously performed by union employees; *unless*

  (c) the qualifications for the positions at issue have significantly changed, in which case a balancing test will be applied to weigh the respective interests of the employer, the affected employees and the union.

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PRIVATIZATION

- PERB will also look to whether the municipality has truly abolished a service (which is generally permissible) or whether the purported abolition is actually a subcontract, which will be subject to the above standards.
- Even if the municipality is found to have the management right to subcontract a service, there may still be an “impact bargaining” responsibility.

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The Post-Pandemic Bargaining Environment

- Inflationary pressures on wages
  - But what about the many years when wage increases greatly exceeded inflation rates?
  - What does inflation have to do with ability to pay?
- Staffing shortages creating real challenges
- Pandemic funds are drying up
  - One-shot vs. recurring revenues

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The Post-Pandemic Bargaining Environment

- New York State is heading towards tough fiscal choices.
- Inflationary pressures.
- Retirement system rates are creeping up.
- The limiting nature of the tax levy cap.
- Union activism and influence.

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Know Your Starting Point When Negotiating

- "**Past Practice**." Certain past practices may be enforceable either through specific contract language protecting such practices, or through PERB's improper practice procedures for those practices which are unequivocal, consistently long-standing and for which there is a reasonable expectation that the practice would continue.
- **Management Rights and Current Contract Language**. Be sure to fully assess your current right to implement changes based on current contract language. Be careful not to underestimate or overestimate your authority.

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Obligation to Bargain in Good Faith

Summary of "good faith" bargaining – Evidence a sincere desire to reach agreement:

- Must present comprehensible proposals.
- Must be able to explain the objectives of the proposals.
- May have to provide information to substantiate the basis for the proposals.
- No obligation compelling either party to agree to a proposal or change its position.

Matter of Buffalo City School District, 50 PERB ¶ 4532 (2017).

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Obligation to Bargain in Good Faith

- "Hard bargaining" is acceptable and, arguably, encouraged by the Taylor Law. On the other hand, "surface bargaining," *i.e.*, going through the motions without actually intending to reach a final agreement, constitutes an improper practice.
- "Regressive bargaining" may be permissible if explained by intervening circumstances, *e.g.*, decline of budget and/or economic situation, loss of benefit of health insurance cost reductions, etc. Cannot be used to retaliate, or to "teach a lesson."

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Evaluate Mandatory and Non-Mandatory Subjects of Bargaining

- Mandatory Subjects - Matters which if raised must be negotiated. Note: Just because a subject is mandatory does not mean that either side is required to agree.

  Examples: wages, health insurance benefits, paid leave, subcontracting

- Non-mandatory - Matters which if raised need not be negotiated but which may be negotiated by mutual agreement. Note: Sometimes referred to as "permissive."

  Examples: minimum staffing, other management prerogatives

- Impact Bargaining - Although a municipality need not bargain over decisions regarding non-mandatory subjects of negotiations, it must, upon demand, bargain over the impact of such decisions.

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The Limits and Possibilities of Mediation/Fact-Finding

Mediation:

- PERB appoints a mediator to meet with parties and try to encourage settlement.
- Neither party has any obligation to agree to anything (only to act in good faith).
- Mediator is not your friend, simply there to achieve settlement regardless of whether the settlement is fair or unfair for either side.
- But the mediator can serve a useful role as an "outside" arbiter of what is reasonable, consistent with what is going on elsewhere, etc.

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The Limits and Possibilities of Mediation/Fact-Finding

Fact-finding:

- Only mandatory terms are submitted to the fact finder.
- Produces a recommendation only.
- Carefully prepare the employer's position at fact finding.
- Consider the impact of the fact finder's report on the public and the unit membership.

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The End of the Impasse Process?

- Legislative imposition
- Interest arbitration
  - Available to police and fire unions
- Remember – No matter the twists and turns of the bargaining process, no one can compel you to grant a pay raise or enhance a benefit (except an interest arbitration panel).

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Public Communications

- A public employer may communicate directly with union members and/or the general public to explain its bargaining positions and/or to respond to inaccurate statements by the union.
- However, any such communications which are deemed to constitute "direct-dealing" with employees, or which threaten reprisals for protected activity, may be improper under the Taylor Law. *e.g.*, *City of Rochester,* 9 PERB ¶ 4542*; County of Onondaga*, 14 PERB ¶ 4503.
- Be factual (*e.g.*, permissible to publish a union's proposals in local newspaper together with analysis of impact on tax rate [*Brookhaven CSD*, 6 PERB ¶ 3018]).

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Freedom of Information Law and Open Meetings Law Update

Municipal Law Conference

April 30, 2024

Presented by:

Luisa D. Bostick and Andrew D. Drilling

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Agenda

- Freedom of Information Law (FOIL) Updates
  - Overview
  - Fees
  - Electronic Communications
  - Repeal of Civil Rights Law § 50-a
  - Notice of Appeal Requirement
- Open Meetings Law (OML) Updates
  - Definition of Public Body
  - Videoconferencing

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Freedom Of Information Law ("FOIL")

- Who is subject to FOIL?
  - Any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office, or other governmental entity performing a governmental or proprietary function for the state or any one or more municipality thereof, except the judiciary or the state legislature. *See* N.Y. Pub. Off. Law § 86(3).
  - Quasi-Public Agencies may be subject to FOIL based on its "essential attributes." A number of factors may be considered, including but not limited to:
    - Does it administer funds for a public purpose?
    - Is it subject to public regulation?
    - Does it have public officers on the Board?

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Freedom Of Information Law ("FOIL")

- What is subject to FOIL?
  - Any information kept, held, filed, produced, or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes. *See* N.Y. Pub. Off. Law §86(4).
- FOIL only extends to ***existing*** documents– no duty to create documents or answer questions.
- Documents "***held for***" a public agency can be subject to FOIL.

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FOIL Exemptions

- § 87(2): Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, **except** that such agency may deny access to records or portions thereof that:
- (a) are specifically exempted from disclosure by state or federal statute.
- (b) if disclosed would constitute an unwarranted invasion of personal privacy (as defined in § 89).
- (c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations.
- (d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.

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FOIL Exemptions

- (e) are compiled for law enforcement purposes and which, if disclosed, would:
  - i. interfere with law enforcement investigations or judicial proceedings.
  - ii. deprive a person of a right to a fair trial or impartial adjudication.
  - iii. identify a confidential source or disclose confidential information relating to a criminal investigation.
  - iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures.
- (f) if disclosed could endanger the life or safety of any person.
- (g) are inter-agency or intra-agency materials.
- (h) are examination questions or answers which are requested prior to the final administration of such questions.
- (i) if disclosed, would jeopardize [an agency's] security of its information technology assets.
- (j) are data or images produced by an electronic toll collection system under authority of Article 44-C of the vehicle and traffic law and in title three of article three of the public authorities law.

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FOIL Exemptions

- Records exempt by state and federal law
  - Attorney/Client Communications
- Unwarranted invasion of personal privacy
  - Public employees have a diminished expectation of privacy (for instance, salaries, gross wages, attendance records are public).
  - Personnel and discipline records are generally discoverable, with personal information redacted.
  - However, to the extent that records are "irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy." *Matter of Wool*, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977.
  - Unproven or unsubstantiated allegations against public employees may be withheld as personally private.
  - Records of one's race, nationality, ethnicity, social security number, home address, phone number, or other personal information may be withheld.
  - Requests for lists of names and addresses of persons for solicitation or fund-raising purposes.
    - Agency may request a certification that a list of names and addresses will not be used for solicitation or fund-raising purposes and/or that the list will not be sold or distributed to another person for such purpose.

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FOIL Exemptions

- Inter-agency or intra-agency materials which are not:
  - i. statistical or factual tabulations or data.
  - ii. instructions to staff that affect the public.
  - iii. final agency policy or determinations.
  - iv. external audits, including but not limited to audits performed by the comptroller and the federal government.
- The specific contents of inter- or intra-agency materials determine the extent to which they are deniable.

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FOIL Timelines and Procedure (§ 89(3) –(4))

- After receiving a FOIL request, the public entity has **5 business days** to either:
  - Make the records available,
  - Deny the request in writing, or
  - Acknowledge receipt of the request and provide an approximate date by which it will be granted or denied.
- Within **20 business days**, the public entity must give a full response or estimate time when the records will be provided.
- Records must be provided on the medium requested, if reasonable. § 87(5)(a).

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Voluminous Requests

- Generally, a public agency cannot deny a FOIL request because it is voluminous.
  - However, there are strategies to address voluminous requests.
    - Is there a "reasonable description" of the records requested?
      - A request for "any and all email" does not "reasonably describe" what is being sought. *FOIL-AO-18949*.
    - Do the records exist and/or can they be obtained with reasonable effort?
      - Agency staff are not required to engage in ***Herculean or unreasonable efforts*** in locating records to accommodate a request (e.g. entry by entry search of an entire directory). *FOIL-AO-18949; FOIL-AO-15751*
- Insufficient staff cannot be used as a basis to deny a request for a large amount of records if an outside service can be retained to perform the necessary work and the applicant agrees to pay the actual cost of reproducing the records.

Voluminous Requests

- The Third Department reversed the lower court's decision to grant access to certain documents and award attorney's fees because petitioner's Article 78 proceeding was premature, as agency's delays were reasonable and did not constitute a constructive denial.
- The Court clarified that an assessment of reasonableness requires consideration of "the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the agency and similar factors," and noted the respondent agency received over 1,250 FOIL requests in the last four months of the relevant period.
- The Court overturned petitioner's award of counsel fees because respondent acted in good faith by specifying a reasonable basis for the delay and promptly released the documents upon completing its review and not just in response to the litigation.
  - *Save Monroe Ave., Inc. v. New York State Department of Transportation*, 197 A.D.3d 808 (3d Dep't 2021)

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Fees

- In general, FOIL permits covered agencies to charge the following fees:
  - Paper copies - $0.25 per page.
  - Electronic copies- only charge if it requires more than 2 hours of time to “prepare” records.
    - Charge hourly wage of lowest paid employee able to prepare records.
- Section 87(1)(b)(3) was amended to prohibit agencies from charging a fee for records where an electronic copy is already available from a previous request made within the past six months.
  - The agency can only charge a fee for the actual cost of a storage device or media if one is provided to the requester in complying with the request.

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Electronically Stored Data

- Data that is stored electronically is subject to FOIL.
- A record is:
  - Any information kept, held, filed, produced, or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes. See N.Y. Pub. Off. Law § 86(4).
- FOIL only extends to existing documents—no duty to create documents or answer questions.
- Documents “held for” a public agency can be subject to FOIL.

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Electronic Records

- Texts and emails are generally subject to FOIL as they are “records.”
- “[E]lectronic communications, such as emails and texts that involve [municipal] business, whether stored on a government or personal device, constitute ‘records’ that fall within coverage of FOIL.” COG Opinion 19429.
- Texts and emails must be retrievable to be disclosed.

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Electronic Records

- A municipality is not obligated to attempt to retrieve deleted texts that may only be recovered from a phone carrier.
  - COG Opinion 19673
- A municipality is not obligated to allow a requestor access to a district-owned device to review an email or text communication.
  - COG Opinion 19429
- Whether retrievable texts and emails must otherwise be disclosed depends on their content.

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Electronic Records

- When communications (including texts and emails) are transmitted between or among government officers or employees, they constitute "intra-agency materials"
  - COG Opinion 19673
- Those portions of the materials consisting of advice, opinions, recommendations and the like may be withheld.
  - Other portions consisting of statistical or factual information, instructions to staff that affect the public, or that represent final agency policy or determinations must be disclosed under FOIL.
  - None of this makes emails, texts or the devices on which they are stored exempt from subpoena.

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Repeal of Civil Rights Law § 50-a

- Section 50-a was repealed effective June 12, 2020.
  - Section 50-a previously permitted law enforcement offices to refuse disclosure of “personnel records used to evaluate performance toward continued employment of promotion.”
  - With this repeal, personnel and disciplinary records of police officers, corrections officers, firefighters, and paramedics are no longer exempted from FOIL.

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Repeal of Civil Rights Law § 50-a

- Two key questions have come out of the repeal of Section 50-a.

1. Does the repeal apply retroactively to records created before June 2020 and to former officers who are no longer employed by law enforcement agencies after June 2020?

2. Can unsubstantiated or pending complaints be withheld due to privacy concerns?

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Repeal of Civil Rights Law § 50-a

- Several trial courts have reached conflicting decisions on whether the repeal of Section 50-a applies retroactively to preexisting records.
- The First, Second, and Fourth Departments of the Appellate Division have found the provision to be retroactive.
- The Court of Appeals has not yet addressed the issue.

First Department Holdings

- The First Department held that the repeal of Section 50-a applies retroactively to records created prior to June 12, 2020, and affirmed the lower court's order to disclose both substantiated and unsubstantiated disciplinary records of police officers identified in the subject requests.
  - *Matter of NYP Holdings, Inc. v. New York City Police Dep't*, 220 A.D.3d 487 (1st Dep't 2023).
- The First Department held that FOIL does not create a categorical or blanket exemption from disclosure for unsubstantiated complaints or allegations of uniformed officers' misconduct. Instead, the Court found these records should be disclosed with identifying details redacted to prevent an unwarranted invasion of privacy.
  - *Matter of New York Civil Liberties Union v. New York Department of Corr.*, 213 A.D.3d 530 (1st Dep't 2023).

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Second Department Holding

- The Second Department held that the repeal of Section 50-a applies retroactively to records created prior to June 12, 2020, and that records concerning unsubstantiated complaints or allegations of misconduct are not categorically exempt from disclosure as an unwarranted invasion of personal privacy, and the law enforcement agency is required to disclose the requested records, subject to redactions with particularized and specific justification.
  - *Matter of Newsday, LLC v. Nassau County Police Department*, 222 A.D.3d 85 (2d Dep't 2023).

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Fourth Department Holding

- The Fourth Department (which has jurisdiction over Western New York) held that the repeal should be applied retroactively, and the personal privacy exemption does not create a blanket exemption to categorically withhold law enforcement disciplinary records, including disciplinary records relating to unsubstantiated claims of misconduct.
- This case has been appealed to the Court of Appeals.
  - *New York C.L. Union v. City of Rochester*, 210 A.D.3d 1400 (4th Dep't 2022), leave to appeal granted, 39 N.Y.3d 915 (2023).

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Procedural Update – Notice Requirements

- The Appellate Division, Second Department held that the failure to advise a requestor of the availability of an administrative appeal from the denial of a FOIL request and person to whom the appeal should be directed as required by 21 NYCRR 1401.7(b) precluded dismissal for failure to exhaust administrative remedies.
- The petition was reinstated, and the matter was remitted to the trial court for a determination on the merits.
  - *Snyder v. Nassau County*, 199 A.D.3d 923 (2d Dep't 2021)

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Open Meetings Law

- Found in Public Officers Law §§ 100 – 111.
- "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe that performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy." N.Y. Pub. Off. Law § 100.
- Under OML, the public has a right to attend meetings of public bodies to listen to presentations, debates, and observe the decision-making process.

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Open Meetings Law

- What is a public body?
  - Any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body consisting of members of such public body or an entity created or appointed to perform a necessary function in the decision-making process for which a quorum is required in order to conduct public business and which consists of two or more members. A necessary function in the decision-making process shall not include the provision of recommendations or guidance which is purely advisory and which does not require further action by the state or agency or department thereof or public corporation as defined in section sixty-six of the general construction law. § 102(2).
  - "Whether an entity is a public body turns on various criteria, including the authority under which the agency was created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which is purports to act, and a realistic appraisal of its functional relationship to affected parties and constituents." *Thomas v. NYC Dept. Educ.*, 145 A.D.3d 30 (1st Dept. 2016).

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Public Bodies

- Have two or more people been given the authority to act collectively?
- Is a quorum necessary to conduct business?
- Is the committee made up solely or primarily of members of a larger public body?
- Does the committee serve a statutory function? Is that statutory function more than merely providing advice? Or is it committee purely advisory in nature with no statutory duties or final decision-making authority?

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Videoconferencing

- Two Ways to use Videoconference

1. Connecting multiple physical locations that are open to in-person public attendance.
   - This option is always permitted.

2. Allowing a member of a public body to participate from a private location through videoconferencing under extraordinary circumstances.
   - This option sunsets effective 7/1/24 absent further action.

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Videoconferencing – § 103-a

- A public body may use videoconferencing to conduct its meetings as long as a minimum number of members are present to fulfill the public body's quorum requirements in the same physical location or locations where the public can attend. § 103-a.
- Beforehand, the governing board must adopt a local law, or a public body must adopt a resolution, following a public hearing, authorizing the use of videoconferencing:
  - **(i)** for itself and its committees or subcommittees.
  - **(ii)** specifying that each committee or subcommittee may make its own determination.
  - **(iii)** provided however, each community board in a city with a population of one million or more shall make its own determination.

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Videoconferencing - § 103-a

- The public body must establish written procedures governing member and public attendance during videoconferencing, and such written procedures must be conspicuously posted on the public website of the public body.
- Members of the public body are to be physically present at any meeting absent extraordinary circumstances.
  - Extraordinary circumstances include disability, illness, caregiving responsibilities, or any other significant or unexpected factor or event which precludes the member's physical attendance.
  - If a member of the public body has a disability that renders them unable to participate in person, the public body may choose to consider that member present for quorum purposes, provided all other requirements are met.

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Videoconferencing - § 103-a

- Except during executive sessions, the public body must ensure that members of the public body can be heard, seen and identified, while the meeting is being conducted, including but not limited to any motions, proposals, resolutions, and any other matter formally discussed or voted upon.
- Minutes of meetings involving videoconferencing must include which, if any, members participated remotely and shall be available to the public.
- If videoconferencing is used to conduct a meeting, the public notice for the meeting must inform the public that videoconferencing will be used, where the public can view and/or participate in such meeting, where required documents and records will be posted or available and identify the physical location for the meeting where the public can attend.

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Videoconferencing - § 103-a

- Meetings conducted using videoconferencing must be recorded and such recordings posted or linked on the public website of the public body within five business days following the meeting and must remain available for a minimum of five years thereafter. Such recordings must be transcribed upon request.
- If videoconferencing is used to conduct a meeting, the public body must provide the opportunity for members of the public to view such meeting via video, and to participate in proceedings via videoconference in real time where public comment or participation is authorized and must ensure that videoconferencing authorizes the same public participation or testimony as in person participation or testimony.
- A local public body electing to utilize videoconferencing to conduct its meetings must maintain an official website.

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Videoconferencing - Quorum

- Members who are participating from a physical location that has been properly noticed and is open to in-person public attendance **do** count toward a quorum and may fully participate and vote.
- Members who are videoconferencing from a remote location that is not open to in-person public attendance **do not** count toward a quorum, unless they meet the disability criteria.
  - They may fully participate and vote if a quorum has otherwise been met.

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Videoconferencing - § 103-a

- The in-person requirements relating to videoconferencing shall not apply during a state disaster emergency declared by the governor or a local state of emergency proclaimed by the chief executive of a county, city, village or town, if the public body determines that the circumstances necessitating the emergency declaration would affect or impair the ability of the public body to hold an in-person meeting.
- Any meetings that use videoconferencing must incorporate technology to permit access by members of the public with disabilities (as defined in the NYS Human Rights Law) consistent with the ADA.
- The videoconferencing rule (§103-a) is currently set to expire on July 1, 2024.

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Committee on Open Government Report on Videoconferencing

- The Committee found that:
  - Many public bodies continue to struggle to meet the required in-person quorum to conduct an open meeting.
  - A significant majority of public bodies, the media, public interest groups, and members of the general public who responded to the Committee's survey strongly support the broadened use of remote access technology to permit meetings to occur regardless of an in-person quorum.

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Questions?

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