

EVENT SUMMARY

2020 Learning Series Session #1: How do I develop a good solar project in my community?
May 15, 2020, 9:00 a.m. – 11:15 a.m.

ABOUT THE 2020 LEARNING SERIES

The 2020 Learning Series is part of One Region Forward’s ongoing efforts to provide technical assistance to municipalities and promote sustainable development in the Buffalo Niagara region. The Learning Series will explore topics in clean energy, water resilience, Complete Streets, land banking, and smart growth. These topics correspond with strategies and actions put forward in the One Region Forward Plan.

ABOUT THE EVENT

Two moderated panels of legal experts, local municipal peers, and representatives from governmental agencies shared what municipalities need to know about large-scale solar development. Originally planned as a half-day, in-person event, the session was transitioned to a webinar format due to public health concerns related to the COVID-19 pandemic.

EVENT ATTENDEES

Ninety-five people attended the event. The majority (54%) of attendees were municipal officials, which includes city, town, and village zoning board of appeals and planning board members and alternate members as well as councilmen, supervisors, and deputy supervisors. Planning and engineering professionals (18%), nonprofit representatives (4%), and code enforcement officers and building inspectors (4%) were also in attendance. Fifty-four percent of attendees were from Erie County, 16% were from Genesee County, and 12% were from Niagara County.

Attendees were given the opportunity to respond to a post-event survey. Of the 95 attendees, 52 (55%) attendees responded to the survey, however, responses from 5 attendees who did not attend the event in full were excluded from the analysis of the survey results. Responses to the survey were generally positive. Eighty-three percent of respondents would “absolutely” attend an event like this in the future. General feedback about the event was that it was “very informative,” “very well organized and orchestrated,” and that the “panelists were well prepared and knowledgeable.”

WELCOMING REMARKS

Bart Roberts from the University at Buffalo Regional Institute welcomed the attendees to the event before providing an overview of the One Region Forward planning initiative and the 2020 Learning Series. Mr. Roberts then explained the mechanics of the event, which was conducted via Webex. He concluded his remarks by noting the number and variety of attendees, which he expressed is “within the spirit of what One Region Forward is about.”

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SESSION 1: PREPARING FOR SOLAR

Jason Kulaszewski, the moderator for the first panel and the Clean Energy Coordinator for Erie and Niagara counties, kicked off the first panel by giving an overview of the Clean Energy Communities program. He then introduced the panelists: Jennifer Manierre from the New York State Energy Research and Development Authority (NYSERDA), Peter Jeffery from the Town of Porter, and Mary Underhill, from the Livingston County Planning Department.

Ms. Manierre presented *Managing Solar in Your Community*, in which she described the model laws, tools, and resources that NYSERDA can provide to municipalities considering adopting a solar law. New York State has a goal of installing 6,000 megawatts of distributed solar by 2025 as well as a goal of building a 100% carbon-free electric system by 2040. In order to achieve these goals, New York State has committed \$5 billion in funding over ten years through the Clean Energy Fund towards large-scale renewable energy projects. The *New York Solar Guidebook for Local Governments*, among other resources, can help municipalities prepare for these large-scale projects, as well as for smaller solar systems that are less than 20 megawatts. NYSERDA also assists municipalities with municipal procurement, permitting, inspections, PILOT (payment in lieu of taxes) agreements, and a variety of other aspects of siting solar, wind, and battery energy storage projects.

Next, Mr. Jeffery and Ms. Underhill presented on their backgrounds in solar development. Mr. Jeffery is the Town of Porter's Code Enforcement Officer, and led the Town's rewrite of its solar law in 2019. The Town of Porter's rewritten solar law used NYSERDA's model law as a starting point and incorporated community benefit provisions for commercial solar developments. Shortly after the law was ratified, the Town put into place a six-month moratorium on commercial solar development in response to resident concerns about commercial solar development. After the moratorium was put into place, the Town set up a solar advisory committee with representatives from the community in order to rewrite the new solar law to address these resident concerns. Reflecting on the process, Mr. Jeffery said, "I'm confident that the end result here is going to be better informed ... I think it's really land use planning at its best."

Ms. Underhill is a planner at the Livingston County Planning Department and provides technical assistance to Towns and Villages with developing solar laws. In Livingston County, there are nine municipalities who have enacted solar laws, while three others are actively working on developing one. One municipality has also has a battery energy storage law in process, and two others are actively working on battery energy storage laws. Ms. Underhill said that these municipalities have used the NYSERDA model laws as a starting point, but they have also shared with one another lessons learned from developing their own laws in accordance with existing agricultural and comprehensive plans, which she said has led to these laws being "enhanced over time." Some of these enhancements include additional language to protect prime soils, farmland, and viewsheds, to regulate the decommissioning of solar projects and restoration of land to pre-existing conditions, and to ensure financial sureties and PILOTs (payments in lieu of taxes).

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After the panelists' presentations, Mr. Kulaszewski began the question and answer portion of the session.

Q: "One of the questions that came up continuously in the pre-registration was how to balance or encourage solar development while still trying to protect other uses like agricultural land."

A: Ms. Underhill replied that in Livingston County, municipalities have responded in a variety of ways to large-scale solar development. "We have ... two communities that decided to prohibit large-scale solar throughout their Towns. We have some that have identified zoning districts where large-scale solar would be prohibited ... We had one community that put an acreage limit across all zoning districts so it could not exceed 25 acres ... We had two communities that looked at prime soils, lands in agricultural districts, and the way the lands were used. And they actually did a calculation, if we provided setbacks and buffering and put some areas in protection, how many acres would be left for solar? And so they balanced it out that way. We had a couple of communities that put a percentage on it. We have one that has zero percent prime soils or farmland of statewide importance can be engaged with solar, and we have some folks that have said, no we'll allow 20, 25 percent, or we'll allow 50 percent based on the makeup of their community and their goals and values."

Mr. Jeffery also responded. "The major zoning district in the Town [of Porter] are agricultural zones, so that was certainly an important issue when we wrote our law. We established lot coverage percentages ... for the ... soil groupings that are considered prime." He also noted that in the Town, solar projects are limited to five megawatts, which "equates to about 25 acres ... so that kind of limits the scale."

Ms. Manierre added, "the model law is a template and it can be edited to fit the needs of the communities."

Q: If the NYS Uniform Building Code has battery energy storage requirements, what do municipalities need to adopt their own local laws?

A: Ms. Manierre replied that there is not a need for a law "as fire as the fire safety requirements go. There used to be until we were able to get that emergency ruling through and adopt the 2019 energy storage supplement last year ... But as far as zoning considerations go and how they're permitted, it's so important to have a local law on the books." She noted that there are similar considerations for battery energy storage projects as there are for solar projects, such as screening requirements.

Mr. Jeffery concurred, noting that setbacks are another important consideration. He also noted that the Town of Porter is "in the process of looking at the model ... energy storage law and hope to have one ... in the near future."

Q: Is there a time limit for when PILOT (payment in lieu of taxes) agreements can be developed?

A: Ms. Manierre stated that, "as soon as a developer notifies you that they're interested in building a project ... that would be exempt through Real Property Tax Law 487, immediately let them know [that] you're interested in negotiating a PILOT [agreement] within 60 days of that notice. Otherwise, you might lose the opportunity to do so."

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Q: What is the best way to steer development toward a certain land use like an industrial site or a brownfield site?

A: Mr. Jeffery stated that the Town of Porter's solar advisory committee is considering ways in which to incentivize solar development in industrial areas, such as "loosening" a provision in the Town's 2019 rewrite of its solar law that limited solar development in heavily treed areas and required replanting of trees if they were cut down to make way for solar development. Other incentives the Town is considering is allowing higher density of development and shorter setbacks, re-evaluating screening requirements based on site-specific conditions, and possibly creating a solar overlay district.

Ms. Underhill also responded. "We did see one community that did some incentivizing, so if you did put it [solar development] in a commercial or industrial zone ... there would be some loosening of the lot coverage. So they were allowed to have more lot coverage if they [solar developers] pursued it [solar development] in those areas that were more appropriate. What we'd be interested in seeing, and hopefully NYSERDA will have more information on this, is the build-ready site ... We're looking for language about that. We see that coming in the 94-c."

Q: If a Town opts out of the Real Property Tax Law 487, is there any flexibility in terms of what is being opted out of? If a Town opts out, will utility and residential both be taxed?

A: Ms. Manierre responded that "opting out of Real Property Tax Law 487 is all or nothing. You can't say we're going to opt out just for these large systems because we want to tax those, but remain giving the tax benefits to residential systems ... If you opt out, your residential systems are going to be fully taxed as well. Another good reason I recommend not opting out. You're always free to ... negotiate a PILOT [agreement] for those larger projects and perhaps continue to let the smaller residential systems ride tax-free so that your homeowners remain happy."

Ms. Underhill responded that while she has also encouraged municipalities to not opt out of Real Property Tax Law 487, one municipality in Livingston County has opted out. "One of the things that we had heard was that solar would not come ... but solar is coming and it's coming at an incredibly rapid pace ... They want full taxation. They want to enjoy those benefits if they have land converting from agricultural land into solar. And they weren't worried about the impacts to residential because they didn't think it was going to be a huge hit."

Mr. Kulaszewski concluded the session by thanking the attendees for their questions and noting that some of the questions that were not answered during the first session would likely be answered during the second session.

Survey Results: Eighty-seven percent of survey respondents found the first panel "absolutely" or "mostly" interesting, while 85% of respondents "absolutely" or "mostly" gained useful information from the first panel that they can bring back to their communities. One respondent said that as "a newer member of my Town's Planning Board, this panel provided good information about experiences localities have had with solar projects. It also provided a lot of information regarding the current and future regulations." Another respondent, however, found the panel's topic to be "basic."

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SESSION 2: ENGAGING THE PROCESS

Dan Castle, the moderator for the second panel and the Deputy Commissioner of Planning and Economic Development at Erie County, kicked off the second panel by talking about the importance of knowing how to engage with solar developers once a municipality has a solar law in place, especially given the fact that there are several such processes, including SEQR, Article 10, and the new 94-c process. He then introduced the panelists: Dan Spitzer from Hodgson Russ and Mike Saviola from the New York State Department of Agriculture and Markets.

Mr. Spitzer presented The Solar Project Landscape in New York, in which he described the applicable laws governing the development of large-scale solar projects, including the new Accelerated Renewable Energy Growth and Community Benefit Act, which is “designed to streamline siting of large-scale facilities.” Among other things, the Accelerated Renewable Energy Growth and Community Benefit Act creates a new section of the Executive Law (known as 94-c) that overhauls New York State’s siting process for renewable energy projects greater than 20 megawatts. While much is still unknown about how the new siting process under 94-c will work, Mr. Spitzer noted that the application period is going to be much shorter under 94-c than under Article 10, the current siting process. The new process will also have “a greater focus on working with municipalities” and will be more deferential towards local laws, except those that are deemed “unreasonably burdensome.” Mr. Spitzer provided several examples of provisions of a solar law that are likely to be deemed “unreasonably burdensome,” such as two-mile setbacks or 10% lot coverage limits.

Mr. Saviola presented Renewable Energy Generation Facilities and Potential Impacts to Agricultural Lands, in which he noted that there is immense development pressure on agricultural lands, because they are mostly flat, are usually neither located on or near wetlands nor heavily treed (which means less permitting is required for development), and are usually located in close proximity to transmission lines. In response to this pressure, the Department of Agriculture and Markets has established a series of mitigation guidelines to minimize the impacts of development, including solar project development, on prime soils and other agricultural resources. Mr. Saviola noted that, while the Department does not have legislation to enforce mitigation—like the Department of Environmental Conservation does for mitigating impacts on wetlands—the Department tries to minimize these impacts in other ways, such as by encouraging solar developers to develop on brownfields or on underutilized farmland. He concluded the presentation by urging municipalities to develop flexible solar laws, as certain requirements, such as setbacks, may unintentionally result in “orphaned” unproductive agricultural land.

After the panelists’ presentations, Mr. Castle began the question and answer portion of the session.

Q: “Many communities have already said in their zoning [ordinances] where they’d like to see solar projects developed, yet developers are pursuing projects outside those areas. Now with 94-c appearing to say that the State can overrule local zoning, what recourse do communities really have to steer these projects?”

A: Mr. Spitzer replied that “the intent [of 94-c] is to have greater state control over” the siting of large-scale projects. However, he stressed that municipalities’ local laws will also play a role in the siting process, but only if these laws are not “unreasonably burdensome.” “If you have a landscaping requirement, it’s likely not burdensome. If you have a 200-foot setback ... I don’t know whether they’ll agree with that size setback ... you need to have a legitimate basis [for these requirements] ... When you put restrictions in, reasonable restrictions are going to be followed.”

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Q: If ORES determines a part of the municipality's local law is "unreasonably burdensome," will they waive the entire local law or just the problematic standards?

A: Mr. Spitzer replied that ORES would waive only the portion of the local law that is problematic. "If your whole law said you can't build solar in our town, then that's going to get thrown out. But otherwise, it's just a particular portion ... with wind, it might be a noise limit or a height limit, but it's only that portion of the [law that would be waived] ... Remember, the procedural provisions don't apply—application requirements, zoning requirements—only substantive provisions [apply]."

Q: If your local limits the allowable acreage to 25 acres, would that be considered "unreasonably burdensome?"

A: Mr. Spitzer replied that whether such a requirement would be considered "unreasonably burdensome" would depend on the context. "If you have a reason for 25 acres, then no. If the reason is that you don't like solar ... I'm not sure that that would stand up in any case ... If you just have a blanket law ... that you can't have more than 25 acres of solar ... then I think a judge, the folks at the adjudicatory hearing will look at you and say why? What's the rationale? Why is 25 okay, but 26 not? You have to be very careful about standards that you can't back up."

Q: Is it true that farmland that's now being used for solar cannot go back to an Ag [agricultural] district after the solar project is decommissioned?

A: Mr. Saviola replied that it is not true that farmland that is now being used for solar can never go back into agricultural land use. "As long as the agricultural activity resumes and they meet the eligibility criteria for ag [agricultural] value assessments of farm operations, and the farm meets the definition of farm operations, they're eligible to be included in the agricultural district."

Mr. Spitzer agreed with Mr. Saviola's response but noted that both the Department of Agriculture and Markets and the Department of Taxation and Finance are unclear about whether concurrent land uses with solar, such as sheep grazing, are "truly conversion away from ag [agricultural] use? ... In Massachusetts policy ... they recognize that solar doesn't harm land and that solar is worth pursuing as compared to subdivisions, for example, which clearly end the agricultural use."

Q: If a piece of property is leased to a solar company and it's no longer in an ag [agricultural] use, the owner of that leased property is making a profit beyond his personal consumption by selling energy back to the grid, is this not in fact a retail business which should be regulated differently under zoning [ordinances]?

A: Mr. Spitzer disagreed with this assessment, stating that solar is not a retail business but a "utility-type use ... So I don't know if I would call it a retail use, but it's certainly a use that you have a right to regulate."

Q: What has to happen for more energy storage [projects to be developed]? Is there something holding back energy storage [project development] in Western New York and Erie County, particularly?

A: Mr. Spitzer replied that the reason that there are not more energy storage projects developed in Western New York is that, as it stands, energy storage projects are not profitable to developers. "There's a whole stream of ancillary benefits that energy storage [projects] can provide to the grid ... that are not currently compensated under New York Law. And so developers simply look at things and they pencil them out just like they look at the costs of mitigation and every other cost, PILOT costs ... and right now in Western New York, storage is largely not penciling out."

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Q: Could you talk a little bit about how educational contribution agreements work and about some of the newer trends in host community agreements that more folks should be aware of?

A: Mr. Spitzer explained that in one instance, he worked with a developer who paid its PILOT payment to the host community upfront as one lump sum, and as a result, that community was able to avoid borrowing for another project they were building. In other instances, the developer donated money to the local school districts “for things they cannot use taxes for.” Mr. Spitzer also noted that the Public Service Commission is also now authorized to add credits directly to residents’ utility bills. He cautioned against trying to extract too much in PILOTS from developers, however. “Remember, the developer has ... to produce to your ratepayers a 10 percent savings. So when you add on all these costs—higher PILOTS, Ag [Agriculture] and Markets mitigation, the ag [agricultural] tax that they’ve recently started adding on prime soils—you simply are making projects unaffordable and you’re not getting the benefits to the ratepayers.”

Mr. Castle concluded the session by thanking the panelists for their insights.

Survey Results: Ninety-four percent of survey respondents found the second panel “absolutely” or “mostly” interesting, while 92% of respondents “absolutely” or “mostly” gained useful information from the second panel that they can bring back to their communities. Respondents concurred that the second panel was “impactful,” “very thorough,” and that key points were “well presented.” One respondent said that while the second panel was “a bit advanced,” it was likely helpful for others.

CLOSING REMARKS

Mr. Roberts concluded the event by thanking all the panelists and the attendees for their participation in the event. He asked attendees to fill out the post-event survey and noted that follow-up material, including a recording of the event, would be available on the One Region Forward website, while training certificates would be sent out via email.

After the conclusion of the event, some of the panelists stayed on to answer additional questions that were not answered during the question and answer portions of the sessions.

Q: If a retail business is not permitted by [the zoning] code in an R1 or R2 zone, does that then prohibit the solar business from operating? There are no mixed zoning provisions.

A: Mr. Spitzer replied that “it depends on the way a [zoning] code is written. Some codes say, if we don’t allow it, it’s not allowed. Solar is not considered a retail use ... but solar is considered a utility use, and there’s a number of court cases that say, you can’t zone out solar. So, the wisest thing to do is to specifically create an area for solar.”

Q: The glacial speed of Article 10 is somewhat based on overworked and understaffed State agencies. How will that work in the new law if there are default approvals?

A: Mr. Spitzer acknowledged that the State “has been understaffed for a long time and the current crisis isn’t helping any,” but that having a set of standards under 94-c would help speed up the review process compared to the review process under Article 10.

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Q: Is there any local permitting for projects 20 megawatts and larger? Or is all the permitting now moved to the State under the new 94-c process?

A: Mr. Spitzer replied that for projects between 20 and 25 megawatts, the developer gets to choose whether to go through the local permitting process or the 94-c process. He elaborated that if developers “have a good relationship with the community, you wouldn’t go through the State process” since it is less efficient, and noted that developers that choose to go through the State process would still be subject to the requirements of local law, unless the State deemed these requirements to be “unreasonably burdensome.”

Q: What’s the best source for staying connected and learning more about [the 94-c process] as it unfolds?

A: Mr. Spitzer replied that as ORES “gets up and running,” there will likely be a new website which would be “the best place to check” for more information about upcoming public hearings for the proposed regulations.

Survey Results: Survey respondents suggested topics for future events in the 2020 Learning Series. Some respondents wanted to learn more about large-scale solar development, such as payments in lieu of taxes (PILOTs). Other suggested topics include village planning, traffic calming, business development, commercial and industrial development, and subdivision development.

ADDITIONAL QUESTIONS AND ANSWERS

Because of time constraints, not all questions asked during the question and answer portions of the sessions were able to be answered during or after the event. The questions below were answered by the panelists via email.

Q: If taxing jurisdictions opt out of the property tax exemption, who is responsible for paying them? Is that generally covered in the lease agreement between the landowner and the developer?

A: Mr. Spitzer replied that “in the unlikely event a fully taxed project is built,” the responsibility for paying property taxes should fall on the developer, but that it depends on the lease.

Q: Does the utility connection have to be above ground?

A: Mr. Spitzer replied that interconnections are usually above ground, whereas distribution wires can be either below or above ground. He added, “I’ve never heard of an underground meter, and don’t know if it’s technologically possible.”

Q: Does anyone have any information, or contacts, they could share for people interested in projects in New Jersey?

A: The New Jersey Department of Environmental Protection has a variety of resources about renewable energy projects on their website: <https://www.nj.gov/dep/climatechange/action.html>

Q: Municipalities tend to get only a small share of PILOTs; can a local law overrule that?

A: Mr. Spitzer replied, “No, but the share can be adjusted if the taxing jurisdictions agree to a different split. Otherwise, State law governing IDAs [Industrial Development Agencies] requires the split to be based on tax rates. 497 PILOTs have more room for negotiation, but if every jurisdiction insisted on 487 PILOTs at full taxes (which they can), it is effectively based on the tax rates.”

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Q: If the State wants to ensure these projects have a benefit to the community, why are they statutorily exempt from taxation under Real Property Tax Law 487?

A: Mr. Spitzer replied, “The question implies [that] taxation is the only benefit. First, a PILOT is required so there is a financial benefit, and since solar is placed on land not developable for more profitable uses, it adds value.” He listed other benefits of solar, such as reduced utility costs for local ratepayers, increased competitiveness for commercial and industrial properties (especially when combined with energy storage), and reduced use of fossil fuels, which ultimately contributes to a cleaner environment and a healthier community.

Q: If grazing crops are considered to be a means to protect prime soils, what livestock is preferred to protect installations from these crops?

A: Mr. Saviola replied that sheep are typically used for grazing solar arrays. Ongoing research at the College of Agriculture and Life Sciences at Cornell University is studying the benefits of co-locating sheep grazing with large-scale solar developments. To read more about this research, please visit: <https://solargrazing.org/atkinson-center-grant/>