



# ALBANY LAW SCHOOL

## **Siting Solar Panels under the Zoning Laws of New York State**

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I.	EXECUTIVE SUMMARY.....	5
II.	INCENTIVES.....	6
	a. <i>Federal Incentives</i> .....	6
	b. <i>State Incentives</i> .....	7
	c. <i>New York City Incentives</i> .....	12
III.	GRID INTERCONNECTION ISSUES RELATED TO SMALL SCALE SOLAR ENERGY SYSTEMS .....	13
IV.	SITING SOLAR PANELS UNDER NEW YORK LAW.....	15
	a. <i>Overview of Municipal Action</i> .....	15
	b. <i>Comprehensive Plans</i> .....	16
	c. <i>Spirit of the Ordinance</i> .....	17
	d. <i>Alternative Energy Recognition Via Definitions</i> .....	19
	e. <i>Solar Energy Systems and Accessory Use Zoning</i> .....	20
	f. <i>Special Use Permits and Conditions</i> .....	22
	g. <i>Building Permits</i> .....	24
	h. <i>Site and Subdivision Plan Review</i> .....	25
	i. <i>Building Codes</i> .....	27
V.	CONCLUSION.....	28

## I. EXECUTIVE SUMMARY

Green energy is a hot topic in today's legal climate and business atmosphere. States just now understand the potential of this resource. New York State is among those states joining in the green energy cause, and tapping into that potential. The New York State Energy Research and Development Authority (NYSERDA) was originally created to reduce New York's petroleum consumption, and today NYSERDA has expanded its original purpose to include advancing state energy needs through innovative energy ideas.<sup>1</sup>

Solar energy power is rapidly becoming a staple in New York's alternative energy scheme. This type of green energy converts sunlight into usable power. Photovoltaic systems (PV) are quite common. These systems convert sunlight into electricity through solar panels.<sup>2</sup> The technology has been around since the mid-twentieth century, but has only become popular recently. Solar energy systems were mostly used as alternative sources of power for residences, but this system's application is growing for building owners who normally buy electricity from electricity grids.<sup>3</sup> In fact, PV use in on-grid buildings is growing exponentially.<sup>4</sup>

As the volatile and ever-pricy oil market impacts the United States economy with such force, federal and state governments are trying to find ways to reduce US energy reliance on foreign nations and increase in-state production of alternative energy. Regulation in alternative energy systems is vast, spanning federal, state, and local governments. If you are considering investing in alternative energy such as a solar energy system, you must research regulation at all levels of government. This paper discusses the federal and New York State incentives for

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<sup>1</sup> *About NYSERDA*, NYSERDA.NY.GOV, <http://www.nyserda.ny.gov/en/About.aspx>.

<sup>2</sup> CTR. FOR SUSTAINABLE ENERGY AT BRONX CMY. COLL., *NEW YORK CITY'S SOLAR ENERGY FUTURE—PART I: THE MARKET FOR PHOTOVOLTAIC SYSTEMS IN NEW YORK CITY 2* (2006), [https://www.cuny.edu/about/resources/sustainability/solar-america/reports/NYC\\_Solar\\_Energy\\_Future\\_1.pdf](https://www.cuny.edu/about/resources/sustainability/solar-america/reports/NYC_Solar_Energy_Future_1.pdf).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

alternative energy and New York regulation of alternative energy development, specifically solar energy systems.

## II. INCENTIVES

Incentive funding is not a foreign concept in the United States. Governments often give grants or special funding to non-government entities and individuals to stimulate a relatively underdeveloped need rich with growth potential. NYSERDA, a corporation created by the New York State government,<sup>5</sup> exemplifies this concept. NYSERDA grants are currently stimulating a strong green energy movement in New York.<sup>6</sup>

### a. *Federal Incentives*

There are three kinds of federal incentives each hitting a different market. The first falls directly on homeowners. As of 1995, Congress expanded the Energy Efficient Mortgage program (EEM), which grants homeowners financing to add energy efficient features to their homes.<sup>7</sup> The program works as insurance for a homeowner who purchases or refinances a mortgage to make energy improvements to his or her home.<sup>8</sup> This allows banks to loan homeowners extra money to make the improvements when those homeowners would not otherwise qualify for the larger investment.

Because it is a federally guaranteed loan it is tightly regulated. Borrowers must first be eligible and provide the bank with a satisfactory down payment.<sup>9</sup> The buildings that fall under this program are also limited. Only properties with four or less units are eligible for the program. The grant is also limited to the lesser of either: (1) the dollar amount of improvements including

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<sup>5</sup> N.Y. Pub. Auth. Law §1850-a (2010).

<sup>6</sup> See, e.g., Announcement from NYSERDA, NYSERDA Awards \$1.5 million to Establish Clean Energy Business Incubator Program at Stony Brook University (Feb. 23, 2010), <http://www.nyserda.ny.gov/About/Newsroom/2010-Announcements/2010-02-23-Clean-Energy-Business-Incubator-Program.aspx>.

<sup>7</sup> See U.S. DEP'T OF HOUS. & URBAN DEV., ENERGY EFFICIENT MORTGAGE PROGRAM, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/housing/sfh/eem/energy-r](http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/eem/energy-r).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

reports and inspections or 5% of the property value, (2) a portion of the median area price of a single family dwelling, or (3) a percentage conforming to a limit imposed by Freddie Mac.<sup>10</sup>

The federal government also provides incentives for non-individuals. Those groups include nonprofit electrical cooperatives, public utilities, state governments, Native American governments and corporations, and municipalities.<sup>11</sup> Under this program, called the Renewable Energy Production Incentive (REPI), qualifying organizations receive set payments for every kilowatt-hour of green energy produced and sold for the first ten years of operation.<sup>12</sup> Current legislation for this program extends to the year 2026.<sup>13</sup>

Most recently, Congress passed the Energy Policy Act of 2005 extending a tax credit of up to 30% on residential improvements implementing alternative energy such as solar power or wind-energy systems.<sup>14</sup> The credit applies to solar energy systems and solar water-heating systems built on the property.<sup>15</sup> The regulation requires certain solar energy systems be approved by the Solar Rating Certification Corporation before the taxpayer claim the credit, but the range of alternative energy systems supported by this legislation make this a very agreeable incentive to taxpayers.<sup>16</sup>

#### b. *State Incentives*

New York State is truly fostering the clean energy movement through incentives and legislative action. Through these acts solar energy systems are becoming highly attractive to the

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<sup>10</sup> *Id.*

<sup>11</sup> 42 U.S.C. § 13317 (2006).

<sup>12</sup> *Id.* § 13317(a). Payments are subject to annual appropriations given to the U.S. Department of Energy in each fiscal year. *Id.*

<sup>13</sup> *Id.* § 13317(f).

<sup>14</sup> Energy Policy Act, ch. 149, Pub. L. No. 109-58, 119 Stat. 594 (codified at 42 U.S.C. 15801 et seq.).

<sup>15</sup> See *Residential Renewable Energy Tax Credit*, ENERGY.GOV, <http://energy.gov/savings/residential-renewable-energy-tax-credit>.

<sup>16</sup> *Id.*

average consumer. In the past several years alone, New York City has increased its solar energy capacity by 800%.<sup>17</sup>

The New York State Energy Research and Development Authority has two incentive programs applied across the state: the Program Opportunity Notice (PON) and the Solar Thermal Incentive Program.<sup>18</sup> The PON is a cash incentive program for the installation of PV systems on residential and commercial sites funded by the New York State Renewable Portfolio Standard.<sup>19</sup> Only applicants who contract with certain energy companies are eligible for this incentive, and those applicants are further limited to a maximum kilowatt system contingent on the type of entity applying.<sup>20</sup>

The PON is an excellent opportunity for property owners because it is relatively easy to take advantage of the incentive. Application guides are provided by NYSERDA on the PON website.<sup>21</sup> Those guides take the reader through several steps:

- 1) Confirm electricity is provided to the property by one of the participating energy companies;
- 2) Find an eligible PV installer, and verify with the installer and local government that a PV system can attach to the property without violating NYSERDA and zoning ordinances;

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<sup>17</sup> *NYC Reaches DOE Solar America City Goal 3 Years Early*, Apr. 4, 2012, <http://www1.cuny.edu/mu/sustainable-news/2012/04/04/nyc-reaches-doe-solar-america-city-goal-3-years-early-as/>.

<sup>18</sup> N.Y. TAX LAW §1115 (ee)(McKinney 2010); NYSERDA, *Solar PV Program Financial Incentives Program Opportunity Notice (PON) 2112*, <http://www.nyserda.org/funding/2112pon.asp> (Last visited October 17, 2011).

<sup>19</sup> *Id.*

<sup>20</sup> NYSERDA, SOLAR PV PROGRAM FINANCIAL INCENTIVES PROGRAM OPPORTUNITY NOTICE (PON) 2112: SUMMARY, <http://www.nyserda.ny.gov/Funding-Opportunities/Current-Funding-Opportunities/~media/Files/FO/Current%20Funding%20Opportunities/PON%202112/2112summary.ashx>.

<sup>21</sup> NYSERDA, ATTACHMENT A: PON 2112—SOLAR PV PROGRAM CUSTOMER STEP BY STEP GUIDE, <http://www.nyserda.ny.gov/Funding-Opportunities/Current-Funding-Opportunities/~media/Files/FO/Current%20Funding%20Opportunities/PON%202112/2112atta.ashx>.

- 3) Contract with the installer who then audits the property, property needs, energy-saving possibilities for the property, and debriefs the owner of his or her findings;
- 4) Choose the PV system to be installed and the eligible installer;
- 5) Complete the PON application package, which requires both property owner and installer action.<sup>22</sup>

Once the application package is submitted it is reviewed by NYSERDA for approval.<sup>23</sup> If approved, the installer delivers the system within 120 days and applies for an initial payment from the incentive program.<sup>24</sup> The installer receives the rest of his fee from NYSERDA after the system is installed, approved by the applicable jurisdiction, and has passed utility connection requirements.<sup>25</sup> Because this program is installer driven, it is a relatively easy process for the property owner, making it an excellent incentive for the green energy movement. The program is available until December 2015, and incentive money is given out on a first come, first serve basis so it is ripe to take advantage of now.<sup>26</sup>

NYSERDA also promotes the Solar Thermal Incentive Program. The Solar Thermal Incentive Program is another financial incentive to replace current electric hot water systems with a cleaner, more efficient solar thermal energy system.<sup>27</sup> The incentive covers approximately 15–20% of the installation costs.<sup>28</sup> The process for this incentive is similar to PON. An applicant is only eligible if he or she contracts with certain energy companies and the

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 3.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 1.

<sup>27</sup> NYSERDA, Solar Thermal Incentive Program: Program Opportunity Notice (PON) 2149, <http://www.nyserda.ny.gov/Funding-Opportunities/Current-Funding-Opportunities/~media/Files/FO/Current%20Funding%20Opportunities/PON%202149/2149summary.ashx>.

<sup>28</sup> *Id.* at 2.

applicant must also contract with a NYSERDA approved installer.<sup>29</sup> With this incentive, NYSERDA strives to replace up to 45 megawatts of thermal energy systems, roughly 45,000 homes.<sup>30</sup>

One of the benefits of the NYSERDA programs is that on top of encouraging alternative-energy use, the incentives are creating a pool of skilled installers who will become experts on installation systems and alternative energy efficiency. By encouraging property owners to go green, NYSERDA is building up the green energy market. This could very well be the spark the next generation of workers needs for inspiration on new developments for the budget and environmentally-conscious consumer, a group that is getting larger as the millennium progresses.

The statewide green energy movement is further strengthened by New York tax laws. Currently, New York State offers a tax exemption for all sales of solar energy equipment.<sup>31</sup> This is a broad exemption. Solar energy equipment is defined to include “an arrangement or combination of components installed in a residence that utilizes solar radiation to produce energy designed to provide heating, cooling, hot water and/or electricity.”<sup>32</sup> In addition to the exemption, homeowners who install solar energy systems are eligible for a tax credit equal to 25% of all expenditures made from that system under \$3,750 or \$5,000 depending on whether the system was installed before or after September 1, 2006.<sup>33</sup> The expenditures include not only the physical solar energy system, but also items connected to the system such as installation costs, or engineering or architectural services.<sup>34</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; see *Answers*, [http://wiki.answers.com/Q/How\\_many\\_homes\\_can\\_a\\_megawatt\\_power](http://wiki.answers.com/Q/How_many_homes_can_a_megawatt_power) (last visited Aug. 31, 2012).

<sup>31</sup> N.Y. TAX LAW §1115 (ee)(McKinney’s 2010).

<sup>32</sup> *Id.*

<sup>33</sup> TAX §§ 606(g-1)-(1).

<sup>34</sup> TAX §§ 606(g-1)(2)(B).

Any electricity produced by a solar energy system must conform to the meter and grid standards codified under the Public Services Law.<sup>35</sup> Under this law, the solar energy services consumer is protected from excessive utility charges if the system does not produce enough electricity.<sup>36</sup> The law also mandates that utility companies credit the homeowner for any excess energy produced by the solar energy system.<sup>37</sup> In short, a homeowner who installs and uses a solar energy system is protected on both ends of his investment.

State code encourages property owners to invest in solar energy through the real property law. Under the real property law, homeowners whose property value has increased because they have installed solar energy systems do not have to pay higher taxes associated with the increase in value for fifteen years.<sup>38</sup> This exemption is broad; the law defines solar energy systems to include the arrangement or combination of solar or wind energy equipment that produces heating, cooling, hot water, or mechanical, chemical, or electrical energy through the collection of solar energy and its conversion, protection, and storage.<sup>39</sup> It is also only available to property owners that invest and construct the systems before January 2015.<sup>40</sup> However, while the law offers powerful incentives to invest, the legislature has granted municipalities the power to bar the exemption at the local level so the incentive may be limited.<sup>41</sup>

The exemption is further limited by positional mandates. For example, in order to be eligible for the tax exemption the system itself must meet specific design criteria and physically

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<sup>35</sup> N.Y. PUB. SERV. LAW § 66-j (McKinney 2010).

<sup>36</sup> *Id.* § 66-j(4). *See infra* II for further discussion.

<sup>37</sup> *Id.*

<sup>38</sup> N.Y. REAL PROP. TAX LAW §487(2) (McKinney 2010). The exemption is extended to multiple unit dwellings owned by private individuals or corporations that either implement a conservation plan or fall under a federal or state tax dedication scheme. N.Y. DEP'T OF TAX. AND FIN., ASSESSOR'S MANUAL, VOL. 4, EXEMPTION ADMINISTRATION: PART 1 RESIDENTIAL—OTHER THAN MULTIPLE DWELLINGS (2010), *available at* [http://www.tax.ny.gov/research/property/assess/manuals/vol4/pt1/sec4\\_01/sec421\\_b.htm](http://www.tax.ny.gov/research/property/assess/manuals/vol4/pt1/sec4_01/sec421_b.htm).

<sup>39</sup> REAL PROP. TAX § 487(1).

<sup>40</sup> *Id.* § 487(5).

<sup>41</sup> *Id.* § 487(8).

sit in a specified area facing a precise direction.<sup>42</sup> These limitations apply to both active and passive solar energy systems.<sup>43</sup> Active solar energy systems are systems that use hardware, such as a solar panel, to produce energy, while a passive system incorporates structural, not mechanical, means to harness solar energy.<sup>44</sup> For example, a greenhouse does not use mechanical means to harness energy, rather a greenhouse harnesses solar energy through its use of glass panes facing the sun that trap solar energy in the structure creating a warm environment fit for plant life.

c. *New York City Incentives*

Often because of its size, New York City creates its own initiatives in addition to statewide programs. Currently, New York City has its own tax initiative to promote clean energy use by offering an indirect monetary benefit to property owners who convert to solar energy. The program offers a solar panel tax abatement incentive to property owners who install solar electric-generating systems on their buildings within the City's jurisdiction.<sup>45</sup>

This four year tax abatement is available for 5% of eligible expenditures with a maximum abatement of \$62,500 per year for four years or the building's annual tax liability, whichever is less.<sup>46</sup> In order to be eligible, expenditures for the solar panels must either be incurred on or after August 5, 2008 or be connected to a solar generating system placed in service on or after August 5, 2008.<sup>47</sup> Under this incentive, a tax abatement is given to the applicant as long as the application is received by March 15 of the year the applicant wishes to take advantage of the

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<sup>42</sup> N.Y. STATE ENERGY OFFICE, SOLAR AND WIND ENERGY SYSTEMS: DEFINITIONS AND GUIDELINES FOR PROPERTY TAX EXEMPTIONS 8, [http://www.tax.ny.gov/pdf/publications/orpts/manuals/vol4/solar\\_report.pdf](http://www.tax.ny.gov/pdf/publications/orpts/manuals/vol4/solar_report.pdf).

<sup>43</sup> *Id.* at 6.

<sup>44</sup> *Id.* at 6, 10.

<sup>45</sup> NYC Buildings, *Solar Panels*, [http://www.nyc.gov/html/dob/html/sustainability/solar\\_panels.shtml](http://www.nyc.gov/html/dob/html/sustainability/solar_panels.shtml) (Last visited Aug. 31, 2012).

<sup>46</sup> NYC BUILDINGS, NYC SOLAR ELECTRIC GENERATING SYSTEM PROPERTY TAX ABATEMENT PROGRAM 1 (2010) [http://www.nyc.gov/html/dob/downloads/pdf/solar\\_factsheet.pdf](http://www.nyc.gov/html/dob/downloads/pdf/solar_factsheet.pdf).

<sup>47</sup> *Id.*

incentive; this program is scheduled to sunset in 2013.<sup>48</sup> Therefore, this is the last full year for applicants to secure the abatement.

### III. GRID INTERCONNECTION ISSUES RELATED TO SMALL SCALE SOLAR ENERGY SYSTEMS

One of the basic reasons the clean energy movement is so popular is because in the long run, clean energy solutions save money. Solar energy systems for example can sometimes produce enough energy to run a household without the use of a grid company. New York recognizes this and has created a process called net metering, which allows households to use solar energy systems to run independent of a national electric grid scheme.

Net metering is a process that allows electric customers to install small-scale energy systems and connect those systems to the public electricity grid to displace billable energy.<sup>49</sup> Under New York law net metering is “the use of a net energy meter to measure, during the billing period applicable to a customer-generator, the net amount of electricity supplied by an electric corporation and provided to the corporation by a customer-generator.”<sup>50</sup> Accordingly, a homeowner using grid electricity may use his or her solar energy system as the house’s energy provider, reducing their grid electric bill, and at times eliminating the cost completely.<sup>51</sup> If the energy sent back to the grid from the small-scale solar energy system exceeds the amount of energy used by the customer for that billing period then a credit is given by the corporation for the amount sent back to the grid.<sup>52</sup> If at the end of the year the customer still has a credit then the corporation reimburses the customer for the energy he or she supplied the grid.<sup>53</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> See Wikipedia, *Net metering*, [http://en.wikipedia.org/wiki/Net\\_metering](http://en.wikipedia.org/wiki/Net_metering) (last visited Aug. 31, 2012).

<sup>50</sup> N.Y. PUB. SERV. LAW §66-j (McKinney 2010).

<sup>51</sup> *Id.* § 66-j(4).

<sup>52</sup> *Id.* § 66-j(4)(b).

<sup>53</sup> *Id.* § 66-j(4)(c).

In order to use net metering with a small-scale solar energy system, a homeowner must comply with the New York Standardized Interconnection Requirements (SIR) standards.<sup>54</sup> Those standards are regulated by the New York Public Service Commission (PSC).<sup>55</sup> The PSC has laid out a six step process for energy generating systems that produce twenty-five kilowatts or less of energy:

- 1) The applicant must communicate to the PSC that it is interested in applying to connect to the grid;
- 2) The grid company examines the scope of the proposed energy distribution so the company can provide the necessary information to the applicant;
- 3) The applicant files his or her application for net metering;
- 4) The application is reviewed and if SIR is met the company contracts with the applicant for net metering, and the applicant has ten days to install the system in accordance with company mandates;
- 5) Once installed, the system is tested for certification;
- 6) If the system passes the certification test, the applicant will receive a formal letter of acceptance for interconnection.<sup>56</sup>

Because municipalities may prohibit homeowners from selling electricity through net metering there is varying precedent on net metering. The Village of Briarcliff, for example, limits solar energy systems to producing energy for the owners, tenants, and occupants of the

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<sup>54</sup> *Id.* § 66-j(2).

<sup>55</sup> *See generally id.*

<sup>56</sup> NYSEG, *Application Steps for Customers Installing Systems that Generate 25 kw or Less*, <http://www.nyseg.com/SuppliersAndPartners/distributedgeneration/1FBdistributedgenerationapplicationprocessoverview.html> (last visited Aug. 31, 2012). Applicants with systems metered at 25 kilowatts or less may be required to install dedicated transformers and safety equipment at the applicants expense. *Id.* Note—systems that exceed 25kW and range up to 2MW must follow an eleven step SIR process. NEW YORK STATE PUBLIC SERVICE COMMISSION, STANDARDIZED INTERCONNECTION REQUIREMENTS AND APPLICATION PROCESS FOR NEW DISTRIBUTED GENERATORS 2 MW OR LESS CONNECTED IN PARALLEL WITH UTILITY DISTRIBUTION SYSTEMS 4–8 (2010).

property.<sup>57</sup> Property owners are not permitted to sell the excess energy to the grid company, but they may sell extra electricity through “net billing” or any other method of sale in accordance with the corresponding PUBLIC SERVICE LAW.<sup>58</sup>

#### IV. SITING SOLAR PANELS UNDER NEW YORK LAW

Local governments hold the power to regulate land use within their jurisdictions.<sup>59</sup> Under this power, New York municipalities regulate small-scale energy systems in varying degrees of complexity. Often the level of zoning ordinance reflects the municipalities’ desire to encourage solar energy systems. When ordinances are complex, it is safe to assume the municipality is not supportive of this form of alternative energy. No matter the degree of difficulty, however, no municipality has banned the implementation of solar energy systems. This section will look at the different zoning schemes in New York municipalities.

##### a. *Overview of Municipal Action*

In general, municipal action cannot contradict the laws of New York State. Municipal law focusing on land use must conform to the New York State Environmental Quality Review Act (SEQRA).<sup>60</sup> Under this statute, any municipal action involving site planning, zoning variances, and special permits must follow a comprehensive review on environmental impacts.<sup>61</sup> This statute applies to all forms of land use planning.

Regulations enforcing SEQRA outline report requirements. The breadth of the assessments changes depending on the type of local action. The Department of Environmental Conservation distinguished two types of local action and, appropriately, named those actions

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<sup>57</sup> BRIARCLIFF MANOR, N.Y., CODE §220-9.1(B)(1) (2007).

<sup>58</sup> *Id.*

<sup>59</sup> *See Vill. of Euclid v. Amber Realty*, 272 U.S. 365 (1926).

<sup>60</sup> N.Y. ENVTL. CONSERV. LAW § 8 (McKinney 2010); JOHN NOLON, WELL GROUNDED; USING LOCAL LAND USE AUTHORITY TO ACHIEVE SMART GROWTH 183 (2001).

<sup>61</sup> NOLON, *supra* note 60.

Type I and Type II actions.<sup>62</sup> Type I actions are presumed to have significant adverse impacts on the environment; common examples include comprehensive plans and amendments to zoning code.<sup>63</sup> If municipalities seek Type I action, they are required to fill out an Environmental Assessment Form, a long and detailed assessment, and report findings in an Environmental Impact Statement.<sup>64</sup> Type II actions do not carry that presumption because Type II actions usually only encompass maintenance work on developed land use laws.<sup>65</sup> Because Type II actions have less impact on the environment they do not require the Form or Statement mandated in Type I actions.<sup>66</sup>

Determining under which Type municipal action falls is more like a judgment call; there are no strict guidelines to help label local government work. The size of the area being regulated by zoning ordinances usually determines the type of municipal action. If a zone has more than ten units, ordinances affecting land use are more likely to fall under Type I action.<sup>67</sup> Proposed subdivision building plans and designs connecting many new units to a public water system typically fall under Type I action as well.<sup>68</sup> The common thread between these municipal changes is that the potential for impacting the environment is great.

b. *Comprehensive Plans*

A strong method of protecting alternative energy systems is through a comprehensive plan. In a comprehensive plan, a municipality sets goals for community development that include social and environmental values.<sup>69</sup> Here, municipalities actually insert language

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<sup>62</sup> 6 N.Y. COMP. CODES R. & REGS. tit.1 §362.3(2012). Unlisted actions fall under Type I assessment requirements.

*Id.*

<sup>63</sup> ENVTL. CONSERV. § 8.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> PATRICIA E. SALKIN, AMERICAN LAW OF ZONING §6:2 (2008).

outlining future renewable energy plans in the ordinance scheme.<sup>70</sup> There is no comprehensive plan template so the plans come in many different forms, but despite dissimilar formats, courts interpret these devices to include actual plans, the overarching theme of the plan, and the text of the plan depicting the law's purpose.<sup>71</sup> Today New York State defines a comprehensive plan as:

[T]he materials, written and/or graphic, including but not limited to maps, charts, studies, resolutions, reports and other descriptive material that identify the goals, objectives, principles, guidelines, policies, standards, devices and instruments for the immediate and long-range protection, enhancement, growth and development of the town located outside the limits of any incorporated village or city.<sup>72</sup>

Aside from setting out the long term goals of the community and preserving local values, the comprehensive plan serves as a guide to the enactment of local laws. All local zoning regulations that are enacted must be in accordance with the local comprehensive plan (in any form it may take).<sup>73</sup> Thus zoning laws are the means to accomplish an end vision provided by the comprehensive plan.<sup>74</sup>

Municipalities are encouraging alternative energy use through comprehensive plans by establishing solar rights. "Solar rights" is a concept that allows a property owner to defend his or her right to solar energy against all others, meaning the owner's use of sunlight is protected from neighbors changing their landscape in such a way as to alter the established sunlight normally collected on the owner's property.<sup>75</sup> Usually, solar rights are granted through zoning ordinances.

In order to grant solar rights through zoning, this protection must be granted under state law. New York provides such a foundation, permitting local governments to enact solar rights in

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<sup>70</sup> JOHN R. NOLON & PATRICIA SALKIN, CLIMATE CHANGE AND SUSTAINABLE DEVELOPMENT LAW 199-200 (2011).

<sup>71</sup> SALKIN, *supra* note 69, §6:5; *Udell v. Haas*, 235 N.E.2d 897, 901-02 (N.Y. 1968).

<sup>72</sup> N.Y. TOWN LAW § 272-a (2)(a) (McKinney 2012).

<sup>73</sup> *Id.* § 263; N.Y. GEN. CITY LAW § 20(24-25) (McKinney 2010) (replacing comprehensive plan with a well-considered plan); N.Y. VILLAGE LAW § 7-704 (McKinney 2010).

<sup>74</sup> SALKIN, *supra* note 69, § 6:2. See *Asian Americans for Equality v. Koch*, 527 N.E.2d 265 (N.Y. 1988).

<sup>75</sup> Sara C. Bronin, *Solar Rights*, 89 B.U. L. REV. 1217, 1223 (2009).

a comprehensive plan.<sup>76</sup> With this power, municipalities have the ability to encourage and establish solar energy as a powerful form of alternative energy.

Only a few New York municipalities take advantage of solar rights in a comprehensive plan. The Town of Dickinson, City of Kingston, and the Village of Nyack all provide for necessary access to sunlight for solar energy systems.<sup>77</sup> The Village of Quoque and the Town of Southold actually inserted language promoting solar energy systems in their zoning laws.<sup>78</sup>

*c. Spirit of the Ordinance*

Instead of including solar rights in a comprehensive plan, sometimes municipalities write protective language throughout their zoning ordinances. This is effective because the systems are still protected as interpreted through case law. Under *Udell v. Haas*, for example, the New York Court of Appeals held that language located anywhere in a municipal ordinance is insightful as to the scheme of the comprehensive plan.<sup>79</sup> In short, language in a comprehensive plan, or lack thereof, will not restrict the interpretation of a zoning ordinance—courts are willing to follow the spirit of the plan as long as the “relevant evidence” promotes such a result and language is indicative of spirit.<sup>80</sup> This case law grants municipalities the flexibility of providing a less strict alternative energy policy, while still protecting alternative energy installation and use.

Municipalities are divided on how they approach fostering the alternative energy movement. Some zoning ordinances expressly encourage solar energy and access to light, while other ordinances simply provide protection from the deprivation of sunlight access. For example,

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<sup>76</sup> GEN. CITY § 20(24); TOWN § 263; VILLAGE § 7-704; *See also* ch. 742, 1979 N.Y. Laws 1–2 (allowing municipalities to amend their zoning legislation to allow for solar energy systems and the access to sunlight that is necessary for the functioning of such systems).

<sup>77</sup> DICKINSON, N.Y., CODE § 600-1 (1986); KINGSTON, N.Y. CODE § 405-1(A)(8) (1985); NYACK, N.Y. CODE § 360-1.4(K) (2009).

<sup>78</sup> QUOAGE, N.Y. CODE § 196-1(1984); SOUTHOLD, N.Y. CODE § 280-2(J) (1983).

<sup>79</sup> *Udell v. Haas*, 235 N.E.2d 897, 902 (1968).

<sup>80</sup> *Id.* at 901–02.

the Town of Dover preamble to its zoning law explicitly provides encouragement for “the conservation of energy and the appropriate use of solar and other renewable energy resources,”<sup>81</sup> whereas the Town of Hyde Park is not as robust in its alternative energy policy, only ensuring the continuation of light access and not expressly for solar energy power, but to “accomplish the other purposes enumerated in . . . the Town Law.”<sup>82</sup>

d. *Alternative Energy Recognition Via Definitions*

Instead of offering a comprehensive plan or expressing policy in a preamble, some municipalities propose alternative energy systems in the specific zoning ordinance itself through definition sections. Usually these definitions explain which equipment is covered and create a landuse right in solar access. Most definitions are uniform; some, however, specify which systems and access rights accompany land use.

Some ordinances only define solar energy and solar energy equipment. These definitions are incorporated into a larger scheme, which can sometimes restrict alternative energy use. The Village of Irvington includes solar energy structures affixed to rooftops when measuring the highest point of a building, and while this ordinance specifically excludes solar collectors from height limitations in the code, other zoning ordinances may not be so thorough.<sup>83</sup> These kinds of ordinances run the risk of limiting solar energy system installation if the drafters are not as detailed.

This type of regulation also clarifies the area of law solar energy systems fall under. This is helpful to a homeowner because once the system is defined, the owner can then look to that title of ordinance and make sure he or she is following code in installing and running the system. For instance, the Village of North Haven includes solar energy system installation in the

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<sup>81</sup> DOVER, N.Y. CODE § 145-3(N) (1999).

<sup>82</sup> HYDE PARK, N.Y., CODE § 108-1.4(M) (2002).

<sup>83</sup> IRVINGTON, N.Y., CODE § 224-3 (2003).

definition of home improvement.<sup>84</sup> Therefore, a homeowner seeking to install solar energy systems would follow the home improvement code.

Defining solar rights is indirectly helpful in two respects. First simply placing solar rights in a definition section implies that alternative energy is just a part of the community scheme. It is not a foreign concept that must be encouraged in order to grow. Second, it expands opportunity surrounding solar energy. For example, one municipality created “skyspace” defined as “[t]he space between a solar collector and the sun which must be free of obstructions for a solar energy system’s effective operation.”<sup>85</sup> This creation bestows broad rights upon the owner installing the system because surrounding properties are prohibited from developing any sort of landscape or structure that would interfere with the skyspace. This type of protection is fostered in other municipalities as well.<sup>86</sup>

Solar access protection spills into other municipal ordinances. Tree removal is heavily affected by solar rights. Most local tree ordinances are set in place for a number of reasons including historic preservation, shade conservation to reduce energy costs, increased property values, ecological benefits, and to promote health.<sup>87</sup> However, while trees are important to the ecology of a community, plant life interferes with solar access because shade prevents light from reaching solar energy systems. So where does this leave alternative energy? Plant life is fundamental to a healthy society, yet alternative energy is becoming almost equally important, especially as the state’s dependence on foreign sources of energy grows more costly.

Some municipalities balance the effect tree removal has on solar energy while others have stricter restrictions. The Towns of Ossining and Barcliff restrict tree removal, but the

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<sup>84</sup> NORTH HAVEN, N.Y., CODE § 55-21(A)(1) (2005).

<sup>85</sup> PERRY, N.Y., CODE § 490-10(B) (1994).

<sup>86</sup> See OWASCO, N.Y., CODE § 150-5(B) (2004).

<sup>87</sup> Brian S. Tomasovic, *A High-Voltage Conflict on Blackacre: Reporting Utility Easement Rights For Electric Reliability*, 36 COLUM. J. ENVTL. L. 1, 21 (2011).

removal procedure is less onerous if it improves the efficiency of solar energy systems.<sup>88</sup> The Village of Milbrook, on the other hand, regulates the placement of trees planted for the purpose of creating shade.<sup>89</sup> Further, in Milbrook, property owners must be aware of nearby solar energy systems when planting trees because they must avoid disrupting the established systems.<sup>90</sup>

e. *Solar Energy Systems and Accessory Use Zoning*

In general, land owners have broad authority in how they use their land.<sup>91</sup> When a landowner develops accessory uses on his land, however, he or she may have to get permission from local government before the accessory use is implemented. An accessory use is any sort of use that is smaller than and “customarily incidental and subordinate to” the principal use of the property.<sup>92</sup> For example, a garage is an accessory use, subordinate to the principal use of the land as a residence.<sup>93</sup> An accessory use must also be related to and commonly associated with the principal use.<sup>94</sup>

When a land owner needs a permit to install an accessory use, he or she applies to the local government. Local governments usually follow one of five decision making schemes:

- (1) a *permissive approach* that allows accessory uses which are “customary and incidental,” not specifying the types of uses that fall under this category;
- (2) an *exhaustive approach* that recognizes as “accessory” only those uses which are explicitly listed as such in the municipal zoning code and excluding those which are not mentioned;
- (3) an *illustrative approach* that lists examples of the types and characteristics of accessory uses in a given zone, thus giving enforcement guidance to zoning officials to help interpret which uses may be considered “accessory”;
- (4) a *flexible approach* of listing only characteristics which are either prohibited among accessory uses; and
- (5) listing accessory uses that are allowed only

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<sup>88</sup> OSSINING, N.Y., CODE § 183-9(B)(2)(d) (2010); BRIARCLIFF, N.Y., CODE § 202-5(A)(2)(d) (1996).

<sup>89</sup> MILBROOK, N.Y., CODE § 212-2 (1984).

<sup>90</sup> *Id.*

<sup>91</sup> JOHN R. NOLON & PATRICIA E. SALKIN, LAND USE 99 (2006).

<sup>92</sup> Mamaroneck Beach & Yacht Club, Inc. v. Zoning Bd. Of Appeals of Vill. Of Mamaroneck, 862 N.Y.S.2d 81, 84–85(App. Div. 2008); NOLON, *supra* note 60, at 160.

<sup>93</sup> *See id.* at 159.

<sup>94</sup> *Id.* at 160.

after obtaining a “special use permit” or meeting other administrative requirements.<sup>95</sup> (emphasis added)

Whichever scheme the local government follows determines how complex the permit process is. Usually, installing a solar energy system requires a permit because the system is labeled as an accessory use. The City of Albany labels solar energy systems as such.<sup>96</sup> When a homeowner wishes to install a solar energy system on his or her property, the Board of Zoning Appeals balances the need for solar energy with other landuse regulation, and usually installation is allowed because the city strongly promotes the use of solar energy systems.<sup>97</sup> Most municipalities place restrictions on accessory uses. The restrictions can range from which neighborhoods may install those uses to the exact placement of such a use. For example, in residential neighborhoods, often solar energy systems must be placed in the backyard.<sup>98</sup>

f. *Special Use Permits and Conditions*

Under certain circumstances, property owners must acquire special permission to alter their property, even if there would not be any zoning violation under the current legal scheme. This extra step is called the special use permit process. Under New York law, special use permits are:

[A]n authorization of a particular land use which is permitted in a zoning ordinance or local law, subject to requirements imposed by such zoning ordinance or local law to assure that the proposed use is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such requirements are met.<sup>99</sup>

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<sup>95</sup> JOHN R. NOLON, PATRICIA E. SALKIN, & MORTON GITELMAN, *LAND USE AND COMMUNITY DEVELOPMENT* 259–260 (7<sup>th</sup> ed. 2008); John Forbush, *Siting Backyard Wind Power Facilities Under the Zoning Laws of New York State* 13, [http://www.albanylaw.edu/sub.php?navigation\\_id=255](http://www.albanylaw.edu/sub.php?navigation_id=255) (the first of the white papers as part of the “Renewable Energy Entrepreneurial White Paper Series).

<sup>96</sup> ALBANY, N.Y., CODE §375-93(B) (2008).

<sup>97</sup> *Id.*

<sup>98</sup> ROCHESTER, N.Y., CODE § 120-163(A)(1)(j) (2002); SYLVAN BEACH, N.Y., CODE §136- 28(A)(1)(h) (2009).

<sup>99</sup> N.Y. GEN. CITY LAW § 27-b(1) (McKinney 2010); N.Y. TOWN LAW § 274-b(1) (McKinney 2010); N.Y. VILLAGE LAW § 7-725-b(1) (McKinney 2012).

Generally, special use permits are only required when the local zoning board needs to assess a property owner's use to make sure it does not adversely affect community character. Common examples of special uses within certain zones include: swimming pools, arcades, group homes, offices, etc.<sup>100</sup>

Special use permits are given or denied by a special board. The special board derives this power through New York State law, and is created by the municipality.<sup>101</sup> Whether a special use permit is granted depends on whether the application conforms to local law in text and spirit.<sup>102</sup> The special use permit process can turn into a drawn out affair. Sometimes municipalities hold public hearings on whether to grant a special use permit; this allows members of the neighborhood the opportunity to voice concerns about the special use requested by their neighbor.<sup>103</sup> Overall, it is a very community-oriented, almost democratic process.

Despite the seemingly drawn out process homeowners must face to continue following zoning ordinances, these permits have a policy-oriented advantage. When one is granted, the special use constitutes a “legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the local community.”<sup>104</sup> When municipalities require homeowners to get a special use permit for their solar energy systems and one is granted, that grant is the equivalent of a municipal “OK” on alternative energy. This is beneficial because as more permits are given, alternative energy systems will be absorbed into the general scheme of a harmonious community and further encouraged.

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<sup>100</sup> NOLON, *supra* note 60, at 129.

<sup>101</sup> GEN. CITY § 27-b(2); TOWN § 274-b(2); VILLAGE § 7-725-b(2).

<sup>102</sup> NOLON, *supra* note 60, at 129. The special use permitting scheme takes on various forms and names including but not limited to: conditional use permits, special exception use, and special permit. *Id.*

<sup>103</sup> *See generally id.*

<sup>104</sup> *WEOK Broad. Corp. v. Planning Bd. Of Town of Lloyd*, 592 N.E.2d 778, 783 (N.Y. 1992).

A good number of municipalities follow the special use permitting scheme. The Town of Manchester requires homeowners to apply for a permit if they are thinking of investing in solar energy collectors or panels that do not affix to a home structure.<sup>105</sup> When reviewing the permit application the town's planning board looks at whether the special use maintains the general welfare of the community, follows the spirit of the zoning code, lowers property value, negatively affects traffic flow in the community, contradicts other sections of local law, and whether the permit would create a nuisance.<sup>106</sup> Additionally, in order to even go before the planning board a homeowner's application must be very detailed.<sup>107</sup> While this may seem like a lot of hoops to jump through, it has not stopped solar energy from creeping into Manchester, New York.<sup>108</sup>

*g. Building Permits*

Another way for municipalities to regulate the use and installation of solar energy systems is through building permits. A municipality can subject an owner who wishes to construct a solar energy system to the building permit process to ensure the system's specifications are designed to the municipality's standards. This process generally compels an applicant to submit his or her plans to a review board.<sup>109</sup>

This is an effective control on solar energy system installation because a homeowner cannot begin construction until he receives his or her permit. Delaying construction will give municipalities a broader picture of the solar energy development in the municipality so that it can offer more amenable ordinances to alternative energy users. It also gives municipal programs

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<sup>105</sup> MANCHESTER, N.Y., CODE §325-44(A)(3)(c)[5] (1996).

<sup>106</sup> *Id.* §325-66 (F)(1)(a)–(e).

<sup>107</sup> *Id.* §325-66 (D)(2)(a)–(f)

<sup>108</sup> There are approximately five alternative energy product suppliers within forty miles of Manchester. *See* Yellow Pages: Manchester Solar Energy, <http://www.yellowpages.com/manchester-ny/solar-energy>.

<sup>109</sup> *See for example* BRIARCLIFF MANOR, N.Y., CODE §220-9.1(B)(4) (2007).

the opportunity to gather accurate information about alternative energy in the town or village. Building permits hinder alternative energy investors because they are timely and sometimes costly.<sup>110</sup>

#### h. *Site and Subdivision Plan Review*

Most municipalities require landowners to submit blueprints to a zoning board if they want to modify their land. This type of regulation is called site plan review. A site plan is a drawing detailing proposed developments that includes all the details that may reflect the local specifications required by the zoning code.<sup>111</sup> When a site plan is submitted the zoning board has an opportunity to review all the modifications and ensure the homeowner took municipal ordinances into consideration. In order to avoid a backlog of site plan reviews, most municipalities only require site plans for large developments.

The municipal benefit of site plan reviewing is that it gives municipalities more control than using, say, a comprehensive plan or including solar rights in a code preamble would do. Here, local governments can condition or restrict the building plan.<sup>112</sup> Because municipalities can place conditions on site plans this is actually a popular way for local governments to ensure light access for properties installing solar energy systems. The zoning board can place conditions on the plans mandating a certain level of solar access, which prevents other land parcels from developing in a way that would restrict the system's access to sunlight.

The Town of Livonia, for example, follows the site plan reviewing process. In order to build, an applicant must include location, design, and construction materials in his or her site plan prior to review.<sup>113</sup> This is to make sure any new building plan does not interfere with

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<sup>110</sup> The Village of Bayville charges \$30 to apply for a building permit. BAYVILLE, N.Y., CODE §13-10(B)(1) (1985).

<sup>111</sup> NOLON, *supra* note 60, at 111.

<sup>112</sup> NOLON, *supra* note 60, at 122.

<sup>113</sup> LIVONIA, N.Y., CODE §150-115(B)(18) (2010).

already present solar energy systems.<sup>114</sup> Many other municipalities follow this method of regulation.

Subdivision plan review is similar to site plan review. Here, however, landowners are simply dividing one parcel of land into many parcels to be sold separately.<sup>115</sup> Reviews are performed by a designated board and the process, usually informal, is outlined in the local code.<sup>116</sup> In New York a local planning board can only act after a public hearing is held on the subdivision application.<sup>117</sup> Some municipalities elect to have a preliminary plat review, a review of the subdivision application earlier in the development process, and then another approval at the final plat stage.<sup>118</sup> Many times the ordinance enabling subdivision and plat approval will explain the different standards that will be used by the local planning board during the decision-making process.<sup>119</sup> With solar energy systems becoming more and more prevalent in new developments these standards commonly involve the logistics of siting solar energy systems.

Some of those logistics include lot arrangement and new street considerations. The Town of Ithaca organizes new lots for subdivisions in an arrangement that best utilizes sunlight for individual properties that will be using or are currently using solar energy.<sup>120</sup> When plotting street placement, some municipalities actually condition new streets to face a certain direction in order to grant maximum sun exposure to houses on those streets.<sup>121</sup> Some of those

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<sup>114</sup> *Id.* §150-116(A)(12).

<sup>115</sup> NOLON, *supra* note 60, at 122.

<sup>116</sup> PATRICIA E. SALKIN, *THE AMERICAN LAW OF ZONING* §§ 31:10–31:11 (5<sup>th</sup> ed. 2008) [hereinafter *AMERICAN LAW*].

<sup>117</sup> *See* N.Y. GEN. CITY LAW § 32 (McKinney 2010); N.Y. TOWN LAW § 276 (McKinney 2010); N.Y. VILLAGE LAW § 7-728 (McKinney 2010).

<sup>118</sup> *AMERICAN LAW*, *supra* note 116, § 31:13.

<sup>119</sup> *Id.* §31:18.

<sup>120</sup> ITHACA, N.Y., CODE §234-25 (1993).

<sup>121</sup> *See for example* NEW CASTLE, N.Y., CODE §113-24(H) (1993); PLEASANTVILLE, N.Y., CODE §159-21(F) (1981); POUND RIDGE, N.Y., CODE §117-17(G) (1992); RYE BROOK, N.Y., CODE §219-23(F) (2005); WAWARSING, N.Y., CODE §95-23(F) (2005); WESTBURY, N.Y., CODE §218-22(F) (1989).

considerations are very in-depth. The Town of North Castle looks to its Architectural Board of Review to identify “potential for solar energy exposure” when plotting street directions.<sup>122</sup>

When reviewing site and subdivision plans a municipal review board must take other ordinances into consideration. In some localities, property design and height limitations restrict a property owner’s freedom to build and install items on the land.<sup>123</sup> These considerations are supplemental regulations to central land use laws. Design and height restrictions limit access to solar energy systems because they restrict the type of systems a homeowner can install on his or her property. Some municipalities exclude solar energy panels from zoning height restrictions,<sup>124</sup> but if such an exclusion does not exist, a homeowner may not have legal opportunity to invest in solar energy. Usually design restrictions require homeowners to place solar energy systems in the backyard of the property, but can also include color and reflective surface restrictions.<sup>125</sup>

i. *Building Codes*

Building codes are important for business capitalizing on solar energy system investments. Building codes are set in place to ensure the safety of a building, and while the desire for uniformity has been expressed through the creation of the state New York State Building Code, each municipality usually has its own variation of the code. Therefore, when marketing the sale of solar energy systems with various local governments the seller should make note that the local government may have a different building code than the uniform New

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<sup>122</sup> NORTH CASTLE, N.Y., CODE §§ A216-26(A), A216-24(F) (1993).

<sup>123</sup> AMERICAN LAW, *supra* note 116, § 9:57.

<sup>124</sup> PERRY, N.Y., CODE § 490-31(1994); TIVOLI, N.Y., CODE §231-9(A) (1989); WHEATFIELD, N.Y., CODE §200-24 (1988).

<sup>125</sup> *See* BRIARCLIFF MANOR, N.Y., CODE §220-9.1(B) (2007); LEWISBORO, N.Y., CODE §220-12(G) (2003).

York State Building Code because local governments are allowed to add tighter restrictions to many state codes.<sup>126</sup>

Generally, local governments are left to enforce state code.<sup>127</sup> Some municipalities may choose not to enforce state code, leaving enforcement in the hands of the county.<sup>128</sup> If the county declines to enforce state law then the responsibility falls on the New York Department of State.<sup>129</sup> Building codes consist of various legal sections including: Residential Code of New York State (RCNYS), Building Code of New York State (BCNYS), Plumbing Code of New York State (PCNYS), Mechanical Code of New York State (MCNYS), Fuel and Gas Code of New York State (FGNYS), Fire Code of New York State (FCNYS), and Property Maintenance Code of New York State (PMCNYS).<sup>130</sup>

## V. CONCLUSION

Alternative energy systems are fast becoming a staple in many communities. State incentives and municipal regulation are creating strong roots for solar energy to bloom here. While solar energy certainly has a place in New York State, how nicely it fits into our communities is still being decided.

Incentive programs certainly make solar energy systems more feasible for property owners, but even with the incentives, costs associated with setting up the systems are quite high. In addition to cost, regulations surrounding the systems vary from county to county. The lack of

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<sup>126</sup> N.Y. EXEC. LAW § 379(3) (Mckinney 2010) (“Nothing in this article shall be construed to prohibit any municipality from adopting or enacting any building regulations relating to any matter as to which the uniform fire prevention and building code does not provide, but no municipality shall have the power to supersede, void, repeal or make more or less restrictive any provisions of this article or of rules or regulations made pursuant hereto.”).

<sup>127</sup> EXEC. § 381.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*; GOV’T LAW CTR. OF ALBANY LAW SCHOOL, LEGAL HANDBOOK FOR EARLY STAGE BUSINESS 176 (2010).

<sup>130</sup> GOV’T LAW CTR. OF ALBANY LAW SCHOOL, *supra* note 129. All New York State building codes are available at <http://publicecodes.citation.com/st/ny/st/index.htm>.

uniformity can be confusing for property owners. Fortunately, many municipalities have already updated their zoning codes to include solar energy regulation so confusion should be minimal.<sup>131</sup>

Ultimately New York State is well on its way to becoming a green energy efficient state. As more and more people install alternative energy systems the installation costs should reduce. This area also opens up a new market for businesses selling and designing alternative energy systems. The possibilities green energy presents to the state are practically limitless.

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<sup>131</sup> For a complete list of all zoning ordinances affecting alternative energy please see the tables provided by Columbia Law School at <http://www.law.columbia.edu/centers/climatechange/resources/municipal/municipal-databases>.