HARRIS BEACH MURTHA
ATTORNEYS AT LAW

Economic Development Handbook

SHAWN M. GRIFFIN

HARRISBEACHMURTHA.COM

2026 | 22ND EDITION

This may be considered Attorney Advertising according to the Rules of Professional Conduct.

Harris Beach Murtha formed the Public Finance & Economic Development Practice Group to focus on state and local financings,commercial financings and economic development in New York State. As of 2025, our firm merged with Murtha Cullina and is known as Harris Beach Murtha, expanding our footprint into Connecticut and Massachusetts. Future editions will include sections on Connecticut and Massachusetts development. Our experience in public finance, corporate law, municipal law, tax law, gaming law, energy law, environmental law, real estate, labor law and litigation fosters multi¬dimensional solutions for our client's economic development needs.

This Twenty Second Edition Economic Development Handbook contains additions and updates to reflect statutory and regulatory changes that have occurred in the past year. These changes add wrinkles of complexity to an already dense statutory and regulatory framework. We have left information in on the many programs now sunsetting because we are continuing to support clients through the programs' final phases. With the information provided in this Handbook, we look to provide our clients with tools to sift through this ever-changing landscape – an economic development survival kit of sorts. While certain tools, such as IDA assistance and Empire Zone benefits, may have been sufficient in the past, a bundling of tax benefits, including Brownfield Cleanup Program Credits; low-income housing tax credits; historic tax credits, coupled with the use of EB-5 funds; New Market Tax Credits; Opportunity Zone funds; a local development corporation and/ or an IDA may be necessary to ensure long-term growth and longevity for our community.

Our Practice Group's experience across the state is a result of learning from our clients and their projects. Practice Group members and our clients actively participate in educational sessions sponsored by the New York State Economic Development Council (the "NYSEDC") to share these experiences so others can benefit from the knowledge we have gained. The NYSEDC has consistently pursued legislative and policy changes to provide economic developers with the tools to fight the battles of retention and expansion in New York State. If you work in the area of economic development in New York State, I encourage you to join and actively support the NYSEDC. You can contact the NYSEDC (Ryan Silva) by phone: (518) 426-4058, or on the web at www.nysedc.org.

We have grown to the point where we have individuals taking the lead by region. Bob Murray in Niagara, Erie, Chautauqua and Cattaraugus counties; Russ Gaenzle, Rachel Baranello and Chris Andreucci in the Finger Lakes region through the mid-Hudson area; Joe Frateschi in Onondaga county; Bob Ryan and Justin Miller in the North Country and Capital Region down through the mid-Hudson region; Shawn Griffin, Adriana Baranello and Darius Chafizadeh in Westchester County; Thomas Garry and Andrew Komaromi in the New York City Metro Area and on Long Island. We also have a statewide G.O. practice led by Jeff Storch and a statewide tax group led by Ed Rojas and Tom Glascock. Tom Garry, Bob Ryan, Andrew Komaromi, Ed Rojas and Chiara Haueter focus on State agency work. Shawn Griffin chairs our gaming-related and unique development practices and, along with Mark Schuber, bridges the gap to meet our clients' corporate needs.

As a final note, I want to acknowledge that this Handbook is a collaborative effort of our regional Practice Group. We offer it to our clients and friends with the goal that it serves as a useful tool in economic development efforts across New York. If you have questions or comments, please call or write the Harris Beach Murtha attorney(s) you may already be working with or any member of our Practice Group listed in the Points of Contact tab in this Handbook.

SHAWN M. GRIFFIN, RUSS GAENZLE AND YOUR FRIENDS AT HARRIS BEACH MURTHA

This handbook is also available online at:
www.harrisbeachmurtha.com/public-finance-handbook

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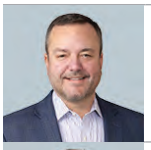

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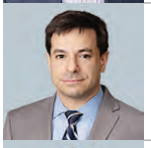

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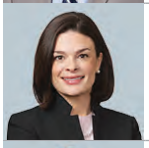

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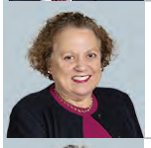

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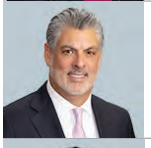

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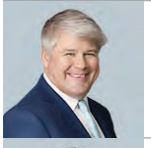

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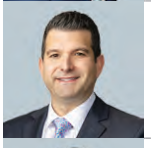

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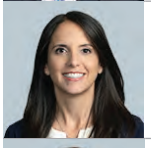

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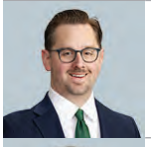

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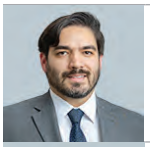

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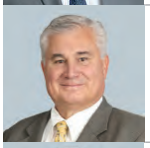

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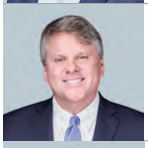

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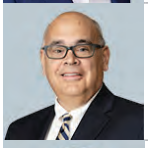

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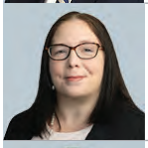

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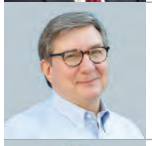

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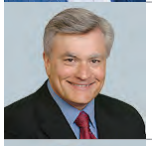

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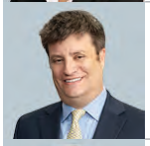

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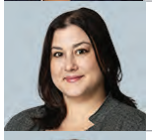

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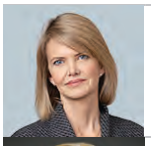

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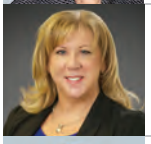

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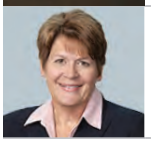

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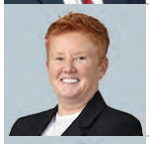

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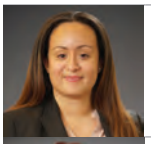

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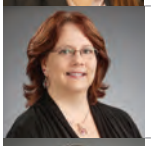

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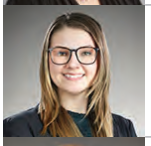

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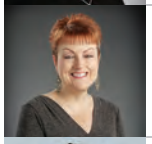

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In Honor of our Friends and Colleagues

Charlie Schachter

1956-2020

Charlie was more than a partner.
To his Harris Beach family he was a friend and confidant. Charlie was the "brains" behind our practice group. He kept a simple office highlighted by family photos and mementos from deals he had closed over the years and from this understated environment a quiet brilliant lawyer created one of the most successful Public Finance law practices in the industry.

Charlie was known by tax professionals nationally. When people learned of Charlie's passing in December of 2020 our email system was overwhelmed with heartfelt condolences from attorneys and firms Charlie had worked with across New York state and nationally.

Michael Townsend

1952-2022

The boy from Maine was a tireless advocate for clients friends and projects. Mike served four Governors as a member of the NYS Power Authority finishing as Chair. He joined Harris Beach in 2003 bringing to us our first large County IDA (COMIDA). We quickly learned that big or small our economic development clients faced the same challenges (macro and micro economic challenges; local political and business concerns and NIMBYism). Mike took on the changing landscape with one goal in mind – get the project done for his clients.

We all got past his love of the Boston Red Sox.

They will never be replaced. Their Harris Beach family will never forget them.

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LOCAL AGENCIES, INCENTIVES AND LAWS

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INDUSTRIAL DEVELOPMENT AGENCIES ("IDAS")

BY SHAWN M. GRIFFIN

A. INTRODUCTION

Industrial development agencies ("IDAs" or "Agency") are formed under Article 18-A of New York State General Municipal Law ("GML"), as amended (the "Act"), as public benefit corporations. From 1969 to 1984, approximately 176 IDAs were formed by legislative acts contained within Title 2 of the Act. There are approximately 110 IDAs still active with varying policies and practices reflecting the local community needs and/or desires[1]. IDAs were created to actively promote, encourage, attract and develop job and recreational opportunities and economically-sound commerce and industry in counties, cities, towns and villages throughout New York State (the "State"). IDAs are empowered to provide financial assistance to private entities through tax incentives in order to promote the economic welfare, prosperity and recreational opportunities for residents of a municipality (a "Benefited Municipality"). Although the activity level for each IDA varies, any company considering a construction/renovation/expansion project or other economic development activity within the State should begin with a call to the local IDA. Additionally, any company that seeks assistance to retain its business interests within the State should contact the local IDA.

Title 1 of the Act vests broad powers in IDAs, including the ability to purchase, sell, lease and/or mortgage real property and to borrow and make money available in connection with properly induced IDA projects. However, as discussed in detail below, because IDAs are public benefit corporations, they are subject to open government laws, have limited investment powers and specifically are not empowered to make outright gifts or grants to a private enterprise.

B. STRUCTURE OF AN IDA-ASSISTED TRANSACTION

Any entity – either for-profit or not-for-profit[2] – that wants to undertake a construction or expansion project[3] in a Benefited Municipality can, in general, be considered a qualified applicant. The IDA usually participates by taking title to or a leasehold interest in the real and/or personal property involved in the project. The IDA then leases the property under a lease agreement, or sells the property under an installment sale agreement, to the company undertaking the project. The payment under the lease or installment sale agreement is usually a nominal consideration, plus debt service on any money the IDA borrowed to fund the project. At the time of closing, the IDA will

[1] See those IDAs reporting at https://www.abo.ny.gov/paw/paw_weblistingIDA.html. There are two IDAs formed under their own authority legislation (City of Troy and City of Auburn).

[2] An IDA's ability to provide financial assistance to or undertake projects for the benefit of not-for-profit corporations has expired. Through structuring and/or use of a local development corporation, necessary benefits can be made available to not-for-profits.

[3] "Project" is currently defined broadly by GML § 854(4) as "any land, any building or other improvement, and all real and personal properties located within the State of New York and within or outside or partially in and partially outside the municipality for whose benefit the agency was created..."

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generally charge an administrative fee ranging from 0.5% to 1.5% of the total project costs.

If a company owns the property before starting the project, it transfers an interest in the property (either fee title or a leasehold interest) to the IDA without paying a transfer tax. If a third party owns the property, the company must arrange for the transfer of an interest in the property to the IDA. The length of time the IDA maintains an interest in the property depends on the financial assistance being provided to the company. (See Section C, below.) When financial assistance is limited to the issuance of tax-exempt bonds and/or a mortgage recording tax exemption, the IDA need only maintain an interest in the property for a period as short as one day. When providing a sales tax exemption, the IDA may secure an interest in the property through the construction or installation period only, or in the alternative, an IDA may provide sales tax exemptions through a Project Agreement. The IDA will maintain an interest in the property for upwards of 20 years or more when offering a real property tax abatement.

Appendix A, attached hereto, shows schematics illustrating the relationships between the parties involved in a straight lease transaction and a tax-exempt bond transaction.

Chapter 563 of the Laws 2015 was enacted on December 18, 2015, and took effect on June 15, 2016, amending Sections 859-a and 874 of the General Municipal Law to require IDAs to develop a standard application for applicants to include, among others, (i) a statement that there is a likelihood that the project would not be undertaken but for the financial assistance[4] provided by the IDA or if the project could be undertaken without financial assistance, a statement indicating why the project should be undertaken by the IDA, (ii) an estimate of private and public funding as well as applicant investment, (iii) job information including salary and benefits, (iv) a statement that the owner, occupant or operator receiving financial assistance is in substantial compliance with applicable local, State and Federal tax, worker protection and environmental laws, rules and regulations, and (v) a statement acknowledging that the submission of any knowingly false or misleading information may lead to the immediate termination of any financial assistance and the reimbursement of any tax exemptions claimed.

Chapter 563 also requires IDA's to adopt uniform criteria for the evaluation and selection of projects for financial assistance that includes, among other things, a written cost-benefit analysis and notification by the IDA to the municipality or municipalities in which the facility or plant was located, if applicable. Furthermore, Chapter 563 requires IDAs to develop a uniform project agreement that sets forth the terms and conditions under which financial assistance will be provided. The project agreement must include, among other things, (i) the purpose to be achieved by the IDA, (ii) annual certification by the applicant of job information, (iii) the PILOT schedule, and (iv) the suspension or discontinuance of financial assistance, or the modification of the PILOT schedule to require increased payments, or the return of all or a part of the financial assistance for material violations of the terms and conditions of the project agreement.

Lastly, Chapter 563 requires the IDA to develop policies for the suspension or discontinuance of financial assistance, or the modification of the PILOT schedule to require increased payments, or the return of all or a part of the financial assistance for such things as material shortfalls in job creation and retention projections or material violations of the terms and conditions of the project agreement. IDAs must at least annually assess the progress of each active project toward achieving the investment, job retention or creation, or other objectives of the project indicated in the project application. See Appendix F for recent regulations issued by the ABO based on Chapter 563 and a checklist we developed to assist our clients with compliance.

C. FINANCIAL ASSISTANCE

The current provisions of the Act allow IDAs to provide four basic forms of financial assistance that include: (1) mortgage recording tax exemption, (2) sales and use tax exemption, (3) real property tax abatement and (4) interest rate savings via tax-exempt financing.

1. Mortgage Recording Tax Exemption

Whenever a county clerk records a mortgage in the State, the mortgagor must pay a 0.75% to 1.85%[5] (of the mortgaged amount) mortgage recording tax – a significant expense on projects involving substantial financing. The IDA, however, can qualify a company for a mortgage recording tax exemption. If an IDA (on a non-recourse basis) has an interest in the property (either fee title or

[4] The law does not require a "but for test" as the applicant can explain circumstances.
[5] NYS 0.50%; Special Additional Tax 0.25%; MTA 0.30%; Westchester County 0.25%; Yonkers 0.50%.

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leasehold interest) at the time the mortgage is recorded, the IDA will mortgage its interest in the property (exempt from the mortgage recording tax under GML § 874 – exemption for taxes and assessments upon any of the property acquired by the IDA or under its "jurisdiction or control or supervision or upon its activities") and the company will simultaneously mortgage its interest in the property (exempt from the mortgage recording tax under New York State Tax Law ("Tax Law") § 255 – as a supplemental mortgage securing the same indebtedness). As an alternative, the IDA and the company can execute one mortgage with the IDA agreeing to pay the mortgage recording tax (which triggers a single exemption under GML § 874). Either arrangement can save a substantial amount of money for the company – from $7,500 to $18,500 for example, on a $1 million principal mortgage. Provided, however, Chapter 394 of the Laws of 2016 was enacted on September 30, 2016, which amended Section 874(1) of the General Municipal Law and Sections 252 and 253(2)(a) of the Tax Law, eliminating the authority for IDAs to exempt the portion of the mortgage recording tax imposed by the following transportation districts: (i) Capital District Transportation Authority, (ii) Central New York Regional Transportation District, (iii) Metropolitan Commuter Transportation District, (iv) Niagara Frontier Transportation District and (v) Rochester-Genesee Transportation District. Chapter 394 also amended the Public Authorities Law to make conforming changes for the two industrial development authorities established under the Public Authorities Law.

Although the statute was amended on October 3, 2016, Governor Andrew Cuomo indicated in his approval memorandum that because the amendment would interfere with the completion of several pending projects, a chapter amendment should be approved to delay the effective date of the amendment to July 1, 2017. Despite the Governor's stated intention, the Legislature was adjourned and the chapter amendment was not passed until January, 2017. The intent was to provide refunds in this gap period and make the change effective July 1, 2017. We note that an LDC can provide a full exemption independently or working with the IDA.

2. Sales and Use Tax Exemption

The sales and use tax rates in the State generally range from 7% to 8.875%. Under GML § 874, all purchases made by an IDA or its agents are exempt from sales and use tax. Pursuant to TSB-M-14(1.1) S, *Sales Tax Reporting and Recordkeeping Requirements for Industrial Development Agencies and Authorities*, agents of an IDA should present a form ST-123 when making purchases for the project. The former practice of using an IDA letter is no longer used. The agent can then acquire the equipment, materials and services needed to acquire, construct, reconstruct and/or equip the project without having to pay sales or use taxes. The exemption is generally limited to the construction, reconstruction or installation period and cannot cover ongoing operational costs. However, tax exemptions for operational costs may be available through the New York State Empire Zones program if currently zone certified. (See discussion below.) A company in an Empire Zone may benefit from both the IDA sales tax exemption (exempts both the local and State portions for purchases of equipment and materials) and the Empire Zone sales tax exemption (exempts State portion only, but also exempts operational costs for up to 10 years). Note, the State of Connecticut has a state process to apply for a sales tax exemption.

Depending on the size of the project, the cost savings for the company under this arrangement can be significant. On a project where $1 million of the costs are subject to sales and use tax, the exemption can result in a savings of $70,000 to $88,750. When the lease or installment sale agreement expires, or any time after the purchase as agent for the IDA, the IDA transfers any personal property that is involved in the project to the company without the payment of any sales or use tax.

Sales Tax Procedures, Administration and Recapture Provisions Instituted with the 2013-14 State Budget. Chapter 59 of the Laws of 2013. The State budget legislation includes GML Section 875[6], which establishes heightened transparency and accountability for the process by which IDAs provide sales tax exemptions to all applicants. Historically, IDAs have been required to follow IDA Act provisions under which estimated sales tax

[6] The IDA Reform provisions from the 2013-14 State Budget, apply to (i) all IDA projects established, agent or project operator appointed on or after the date of the act (March 28, 2013), (ii) any amendments or revisions made to provide additional funds or benefits after the date of the act for projects established, agent or project operator appointed, or financial assistance provided prior to the date of the act, and (iii) to any IDA recapture of state sales or compensating uses taxes on or after the date of the act. The retail provisions embedded within GML Section 862 are not mirrored within Public Authorities Law ("PAL") Article 8 relating to the Auburn Industrial Development Authority ("AIDA") and the Troy Industrial Development Authority ("TIDA"), but the new sales tax provisions are imposed upon AIDA and TIDA within new PAL Sections 2326-a and 1963-b, respectively.

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exemption amounts were disclosed at public hearings and project agents were issued a State-prescribed form ST-60 to evidence IDA agent status for purposes of acquiring goods and services exempt from sales taxes. IDAs were required to timely file the ST-60 with the State Department of Taxation and Finance ("DTF") and project agents were also required annually to file a form ST-340 with DTF. The new provisions will allow DTF to identify and control any disparities between the amount of financial assistance actually granted by IDAs and the amount of exemptions actually received by project agents and operators.

The budget legislation includes significant procedural, administrative and recapture safeguards imposed upon IDAs and their agents, including the following major elements:

(1) IDAs must keep records of the actual amounts of sales tax exemptions conferred to each applicant. IDAs must provide additional information and reports to DTF and reports to DTF within 30 days of providing financial assistance to a project, which includes the estimated exemption amounts. DTF may prescribe new forms for IDAs to use for this requirement.[7] IDAs that fail to file these reports could lose their ability to confer sales tax exemptions (GML 875(2)).

(2) IDAs must include new terms and conditions within resolutions and project documents relating to sales tax reporting and recapture provisions (GML 875(3)(a)). This requirement should be reflected within all project-authorizing resolutions and match the corresponding amount(s) of estimated financial assistance disclosed by the IDA at the required public hearing.

(3) IDAs are required to recapture sales tax exemptions claimed by project agents in excess of the actual amount conferred by the IDA. Failure by an agent to repay any such amounts will allow DTF to directly assess the agent or operator for the exemption amounts, together with any relevant penalties and interest due thereon. (GML 875(3)(b)).

(4) To the extent that an IDA recaptures any unauthorized State sales tax exemption, the IDA must remit same to DTF within 30 days of receipt. IDAs are further required to join DTF in any lawsuit or action to recover unauthorized sales tax exemptions (GML 875(3)(c)).

(5) IDAs are required to issue an annual report on the terms and conditions of all sales tax exemptions conferred and all recapture policies and activities (along with any other information required by the Commissioner of the State Department of Economic Development ("DED"). This report must be filed with DTF, the Director of the Division of the Budget ("DOB"), ESDC, OSC, and the IDA's benefited municipality. The report should be included within an IDA's annual filings with OSC. Failure to file could also result in an IDA's loss of ability to provide future tax exemptions. (GML 875(3)(d)).

(6) IDAs may not use an ST-60 to confer and report sales tax exemptions. IDAs must issue, and appointed agents must utilize, a form ST-123 in order to properly confer and secure sales and use tax exemptions. GML Section 875(5) contains provisions for penalties and implications for fraudulent use that all IDAs and their agents should be aware of.

(7) DTF is authorized to audit IDA records and use any findings to assess agents and operators for any unauthorized exemptions (GML 875(6)).

(8) IDAs must post all project resolutions and sales tax exemption agreements on the internet. These documents must also be provided free of charge to any person requesting the information. This requirement is in addition to and supersedes provisions of the Public Authorities Accountability Act of 2005 ("PAAA") and the Freedom of Information Law, or FOIL. Qualifying "trade secrets" exceptions under FOIL may be used to protect sensitive agent or operator information (GML 875(7)).

(9) IDAs must timely report to DTF any amendments, revocations or

[7] As mentioned above, DTF requires now an agent to use the new form ST-123 and submit it to the requesting vendor.

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terminations of agent appointments (GML 874(9)(b)).

(10) DTF is authorized to adopt rules and regulations regarding the foregoing provisions. Together with forms to be adopted by DTF, all IDAs and practitioners should be prepared to react to, and comply with, same as they are issued in the coming months.

IDAs should annually review their UTEPs and their Policies and Procedures to account for the retail prohibitions under GML Section 862; recapture and forfeiture; for the new sales tax reporting and recapture provisions contained in GML Section 875; and the ABO Regulations. In addition, IDA Application for Financial Assistance should also be amended to require (i) greater detail on proposed project expenditures to assure accuracy on Agency-authorized exemptions, and (ii) project applicants to specifically acknowledge their understanding of the new State sales tax recapture requirements under GML Section 875. All IDA public hearing records, inducement resolutions, agent agreements, leaseback agreements, and, as best practice, sales tax letters, should be reviewed and revised so they contain the terms and conditions of the reporting and recapture provisions of GML Section 875. In addition, all IDAs should carefully review and consider all requests for extensions of IDA agent status for projects that were approved prior to the March 2013 effective date of GML Section 875 and/or any projects that were authorized prior to the use of revised Form ST-60 and/or ST-123. These extensions may require an IDA to carefully review the amount and limits of sales tax exemptions previously authorized and require a new recapture agreement to be executed by the IDA agent. Clearly, it is imperative that IDAs should closely administer and comply with applicable reporting requirements to ensure continued ability to provide financial assistance to applicants. In addition, all IDA applicants, agents and operators should be aware of and comply with these new requirements in order to avoid possible IDA recapture and/or imposition of DTF assessments.

3. Real Property Tax Abatement

In the State, property owners pay a real property tax based on the assessed value of land and improvements to a site. Any real property owned or controlled by an IDA is not subject to ad valorem real property taxes, under GML § 874 and Real Property Tax Law ("RPTL") § 412-a. However, real property owned or controlled by an IDA continues to be subject to special assessments and user fees (water, sewer, fire, etc.). When an IDA takes title to, or a leasehold interest in, real property, the property becomes 100% exempt from ad valorem real property taxes. To accommodate the needs of the local tax jurisdictions, however, the IDA generally negotiates a Payment-In-Lieu-Of-Tax Agreement ("PILOT Agreement") with the company. The IDA will then direct, or receive and forward, these payments-in-lieu-of-taxes to the affected tax jurisdictions in the percentage that each affected tax jurisdiction would otherwise have received but for the Agency's involvement. By law, IDAs have the authority to negotiate any PILOT Agreement they deem reasonable. There is no required formula for calculating the payments to be made under a PILOT Agreement. They are, however, required to have specific policies adopted which outline the types of PILOT Agreements they are offering and procedures for deviation from those stated policies (the Uniform Tax Exemption Policy "UTEP"). If the IDA deviates from its UTEP, it must notify the affected jurisdictions. Although there is no statutory limit to the period or amount of the abatement, IDAs generally limit the period to between 10 and 20 years, with the assumption that the abatement generally results in more revenue for the tax jurisdictions than was generated by the property before the IDA's involvement.

This benefit is generally referred to as a "real property tax abatement" rather than a real property tax exemption, given the interplay between the 100% exemption from real property taxes and the IDA policy of requiring a payment-in-lieu-of-taxes. Some PILOT Agreements provide a specific dollar amount to be paid each year for the term of the PILOT Agreement. The mere predictability provided by such a PILOT Agreement can be invaluable to a developer. Since each PILOT Agreement is negotiated on a project-by-project basis, it is difficult to estimate the exact savings from the real property tax abatement. There is little doubt, however, that the abatement can provide significant savings. As a reminder, certain projects may already qualify for a partial exemption from real property taxes for new improvements under RPTL §§485-b (business investment exemption) or 485-e (Empire Zone Exemption). A company in an Empire Zone may benefit from a refund of real property taxes paid on payments made under a PILOT Agreement. Where companies qualify for a 100% refund from the State, the IDA will often negotiate a payment-in-lieu-of-tax equal to full taxes and allow the increment (difference between full taxes and otherwise negotiated amount) to be used to repay debt service related to certain infrastructure

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improvements (referred to as "PILOT Increment Financing" or "PIF").

Notice for PILOT Agreement Expirations and Terminations. Effective February 14, 2023, IDAs will be required to send notices of expiration for all PILOT Agreements to the affected taxing jurisdictions ("ATJ") at least two (2) years prior to the contract end date, or immediately if a PILOT Agreement is otherwise terminated for any reason. This notice mechanism will help IDAs and ATJs better manage the process for transitioning exempt parcels from Roll Section 8 (exempt) to Roll Section 1 (taxable) when PILOT Agreements expire or are terminated. We recommend all IDAs assemble a PILOT "aging report" for all active PILOT Agreements that includes (i) date of expiration, (ii) date of final PILOT payment(s) and the applicable tax years for which it applies (if known), and (iii) any other relevant provisions of the PILOT Agreement pertaining to expiration, including any full tax "restoration payments," credits afforded for PILOT Payments made against omitted tax bills to be issued under RPTL § 520, etc.

4. PILOT Administration Issues

Pursuant to GML § 874(1), IDAs "shall be required to pay no taxes or assessments upon any of the property acquired by it or under its jurisdiction or control or supervision or upon its activities." This broad exemption is mirrored within RPTL § 412-a, wherein real property "owned by or under the jurisdiction, supervision or control of industrial development agencies enumerated in GML shall be entitled to such exemption." (See 9 Op. Counsel SBEA No. 17 and Ch. 228 of the Laws of 1988, Section 1.)

In order to secure this exemption, an application (See Form RP-412-a, as prescribed by the New York State Office of Real Property Services ("ORPS")) must be filed in the office of the applicable assessor on or before the appropriate taxable status date for the year in which the exemption is first claimed. At such time, copies of the RP-412-a application, along with the PILOT Agreement (or extract of terms thereof), must be mailed or delivered to the chief elected official of each city, county, town and village within which the project is located. Additional applications are not required for subsequent PILOT years unless the terms of the agreement are modified or amended.

It is important to note that the real property tax exemption afforded to and provided by IDAs applies only to general taxes and not to special assessments and special ad valorem levies. (See 1 Op. Counsel SBEA No. 23.) Likewise, the extent to which an IDA may afford an abatement from real property taxes largely depends upon each Agency's adopted UTEP. (See GML § 874.)

While property acquired by the State or Federal government after taxable status date and prior to lien date is immune from taxation (See 2 Op. Counsel SBEA No. 33; 1 Op. Counsel SBEA No. 40, respectively), property acquired by quasi-governmental agencies, such as IDAs (See 5 Op. Counsel SBEA No. 55), urban renewal agencies (See 1 Op. Counsel SBEA No. 68) and economic development agencies (See 2 Op. Counsel SBEA No. 28), is subject to taxation until the applicable tax years following the next taxable status date.

Therefore, the execution, delivery and filing of any IDA PILOT Agreement and related Form RP-412-a, should be carefully timed to account for the applicable taxable status date. Likewise, the exemption afforded by the IDA's jurisdiction, control or supervision of the subject parcel (via deed or lease agreement), along with the applicable abatement schedule, will be effective for the tax years following the applicable taxable status date through the termination date of the PILOT Agreement.

PILOT Termination effective immediately. In contrast to the taxable status date driving the effectiveness of the commencement of the PILOT Agreement, the termination of a PILOT Agreement is considered an immediate taxable event whereby the subject property becomes a fully-taxable improvement as of the date of PILOT Agreement termination. Section 520 of RPTL provides that whenever property receiving a total or partial exemption is transferred to an owner not entitled to receive such exemption, the property becomes immediately liable to taxation, both for the unexpired portions of the fiscal years during which the transfer occurs and for succeeding fiscal years (See OSC Opinion 87-61 and 10 Op. Counsel SBEA No. 87). The appropriate appointed assessor is thereafter empowered to establish the corresponding assessed valuation attributable to the project facility as of the PILOT Agreement termination date and such determination is subject to the administrative and judicial review process set forth within Article V and Article VII of RPTL. (See also 10 SBRPS No. 21.) Notice of Assessment Challenges. Effective December 28, 2022, any person or entity making payments under a PILOT Agreement to provide written notification to IDAs and/or any ATJs receiving PILOT payments at least 45 days before filing for a change of assessment. Existing law for filing changes in assessment before a Board of Assessment Review ("BAR"), or thereafter for filing a formal tax certiorari proceeding, largely involve just notices and filings with the applicable

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assessor, BAR and the assessing unit itself (most often a Town or City). For formal tax certiorari proceedings, RPTL § 708 does require petitions be filed with applicable counties and school districts. However, prior law largely left IDAs out of the chain of communication if a project owner or operator commenced a tax case. While an IDA wouldn't in the normal course become directly involved in a certiorari case, the process and outcome can have a significant impact on PILOT Agreements that include abatement formulas sensitive to the assessed value of a project. In addition, PILOT Agreements often include provisions regarding project owner rights to file such proceedings, which could be relevant to how an ATJ and/or assessor responds to and/or handles a particular claim. This new law will provide advance notices to IDAs and ATJs for BAR and tax certiorari proceedings, which in turn should create additional transparency and opportunities for IDAs and ATJs to work collaboratively.

5. Note Regarding Sending Initial Resolutions and Deviation Notices to ATJs

Effective January 1, 2023, IDAs will be required to send copies of certain resolutions by *certified mail, return receipt requested*, to the chief executive officers of each ATJ, including (i) initial resolutions describing proposed IDA projects, and (ii) resolutions describing any proposed deviation from an IDAs Uniform Tax Exemption policy, or UTEP. (See GML §§ 859-a and 874). Prior law required each IDA to adopt a detailed resolution describing a proposed project and the kinds of financial assistance being considered by the IDA for the project (sometimes referred to as an "Initial Project Resolution" or "Inducement Resolution"). In addition, prior law required IDAs to adopt specific resolutions in connection with a proposed deviation from an adopted UTEP and notify each ATJ in writing that the proposed deviation is being considered, and the reasons therefore (sometimes referred to as "Deviation Notices"). This new law requires IDAs to send its "Initial Project Resolution" or "Inducement Resolution" by *certified mail, return receipt requested* or *an electronic correspondence with a read-receipt* to the chief executive officers of each ATJ, and, where a school district is involved, the certified mailing should be sent to both the district clerk, rather than the school board, and the district superintendent. Likewise, any Deviation Notices must now be sent in the same fashion. IDAs shall establish a procedure for compliance with the notification requirements, including identification of the notification method (See GML §§ 859-a and 874).

6. Tax Increment Financing ("TIF") versus PILOT Increment Financing

TIF has been authorized in New York since 1984. However, only two small TIF financings (approximately $8 million and $1.2 million respectively) had been completed in New York State by the end of 2011. New York modified the statute to permit use of school taxes, but never addressed the "full faith and credit" conflict identified by the OSC. We have instead structured increment financing through the use of IDA PILOT agreements, referred to as "PIFs" A more popular structure was the use of an IDA PIF. One of the main reasons for the infrequent use of TIFs is that the vast majority of municipalities within the State have separately assessed school districts, which results in dividing the property tax receipts between the municipality and the local school district. Prior to 2012, only a municipality could adopt a redevelopment plan and participate in a TIF. As a result, the property taxes generated by the municipality are insufficient to leverage viable bond financing. The exceptions to this general rule are the five big cities in the State – New York, Buffalo, Rochester, Yonkers and Syracuse. Recent legislation expanded the statute by amending the law to allow schools to participate, which generated renewed interest in TIF. However, upon further research as to determine how the increment would be created, a bigger concern arises and this issue was not addressed by the 2012 legislative changes. If TIF Bonds were to be issued by a Town or the County, neither the increment nor the assessed value of the properties within the TIF district could be assured and under certain scenarios, the increment and assessed values decline over time. The PIF structure addresses this concern.

TIF Bonds in New York State call for a rigid statutory process to be followed. The payments that are used for debt service are true tax payments secured by tax liens. However, payments made under the Real Property Tax Law are a function of assessment, equalization rate and tax rate. A falling equalization rate means that assessing unit-wide market values are rising. This leads to the potential for commercial property owners to contest their assessed valuation. With an active grievance practice for commercial properties, a falling equalization rate is likely due to sales of older residential properties. Given the limited circumstances when assessments can be grieved under New York law, those holding their property for long periods tend to have lower assessed valuations versus new owners. As these older residential properties are

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sold, the State formula picks up the spread between assessed value and sale price as one of the factors that impacts the equalization rate being calculated. If a commercial property has recently grieved its taxes and/or is otherwise properly assessed, a declining equalization rate will artificially inflate the estimated market value for the commercial property based on the assessed value and lead to further grievances. If the TIF Bonds were issued for improvements in a defined district, you can assume that these new improvements would be properly assessed when first established. If activity outside the increment area causes the equalization rate to decline, the tax formulas will imply a growing market value for the increment improvements. If this implied increase is beyond what the market price has grown to, the owners of the improvements in the increment district would grieve their taxes. Outside a written tax agreement, there is no way to prevent grievances by the owners in the increment district. As they grieve their taxes their assessment would be adjusted downward. In the extreme case, this practice could continue such that, if tax rates are otherwise stable, the aggregate tax load moves outside the increment district, causing the actual amount paid by the owners in the increment district to decline. Under this scenario, we cannot insure the TIF Bond holders of an increment or the tax jurisdictions of a base payment. This uncertainty was unacceptable to the working groups in other communities with whom we have worked and we note that the other states authorize property tax agreements with TIFs that eliminate these issues and bring certainty to the payment stream. As a practical matter, a property tax agreement would need to involve the IDA or the New York State Urban Development Corporation (d/b/a ESDC). ESDC can establish a PILOT and use payments made for debt service without tax jurisdiction consent, whereas use of payments under an IDA PILOT requires consent of the tax jurisdictions. We assume for the balance of this analysis that use of the IDA is the preferred route. As a final note, use of the IDA for the PILOT does not necessarily mean the IDA will borrow the funds. This is an important note given imposition of the State Bond Issuance Charge on IDA bond issues that does not apply to LDC or other types of borrowing.

Across New York State, there are instances where the increment from a specific project is utilized for debt service with the consent of the tax jurisdictions through use of an IDA PILOT Agreement. When bonds are issued by an IDA, LDC or other designated borrower, and payments under the PILOT Agreement can be set up to have a base amount payable to the tax jurisdictions and an increment used for debt service, the structure is often referred to as "PILOT Increment Financing" or "PIF." This structure became very popular statewide when the Empire Zone program added the refund for property taxes paid. Rather than negotiate a discounted payment under the PILOT Agreement and incur the debts directly, developers opted to pay the amount through the PILOT Agreement such that the amount was refunded and, effectively, the State program ended up paying the debt service on the borrowing. As counsel for over 40 IDAs statewide, we have worked on dozens of these structures between 2002 and 2006.

7. Lower Interest Rates for Debt Incurred as Part of the Project

IDAs are authorized by State law to issue bonds and notes. An IDA can issue tax-exempt bonds, subject to the limitations imposed by the Internal Revenue Code of 1986, as amended (the "Code"). The proceeds of these tax-exempt bonds can be used to fund all, or substantially all, the costs of a project (excluding certain costs of issuance in excess of 2% of the total amount of the bond issue). If the project meets the strict qualification requirements of the Code, the company should then determine if issuing tax-exempt bonds is a cost-effective method of financing the project.

An IDA itself provides no credit enhancement and issues bonds on a non-recourse basis. For that reason, the ability to sell bonds depends solely on the creditworthiness of the company (or the credit rating of the credit enhancement supporting the transaction, if any – see discussion, below). State law does not allow an IDA to loan the net proceeds directly to the company, as is done in other states. Because an IDA does not have the statutory authority to "loan" money, bond proceeds are used by the company to build the project in the name of the IDA. The project is then leased or sold by the IDA to the company for an amount equal to debt service on the bonds issued. The company's rental payments under the lease agreement, or installment purchase payments made under the installment sale agreement to the IDA (or bond trustee), are used to pay principal of and interest on the bonds. The property involved is generally used as collateral and the company's direct guaranty is generally required. It may be necessary to provide some form of credit enhancement, such as a letter of credit issued by a bank or other qualified financial institution, bond insurance, or Federal Housing Administration ("FHA") insurance, depending on the market where the tax-exempt bonds are sold and on the creditworthiness of the company.

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Before proceeding with a bond transaction, the company should conduct a cost/benefit analysis, weighing the cost of financing through traditional means against those costs associated with a tax-exempt bond transaction. Does it pay to finance the project with funds that are at an interest rate that is generally two to three percentage points lower than the cost of borrowing money directly through a taxable transaction? Or will that benefit be outweighed by the additional costs of documenting a bond transaction such as bond counsel fees and, potentially, letter of credit fees of 0.75% to 1.5% of the bond amount, underwriter discount fees of 1% to 3% of the bond amount, underwriter counsel fees, letter of credit and issuer counsel fees, trustee fees and other incidental costs?

A detailed discussion concerning tax-exempt financing is included herein under the Federal Incentives section, below. Since January 2008, most IDAs deliver this form of benefit through an affiliated LDC (see Section II below).

8. Bond Issuance Charge

Pursuant to the New York State Public Authorities Law (the "PAL") § 2976, payment of a "bond issuance charge" to the State is required for any bonds issued by certain public benefit corporations, which, by statute, include IDAs but do not include LDCs. Bond issuance charges will typically be passed on to, and paid by, the borrower. This is in addition to any issuance fee charged by the IDA. The amount of the bond issuance charge is calculated by multiplying the principal amount of the bonds by the following schedule:

Principal Amount		**Percent Charged**
$1,000,000 or less		.168%
$1,000,001 $5,000,000	to	.336%
$5,000,001 $10,000,000	to	.504%
$10,000,001 $20,000,000	to	.672%
More than $20,000,000		.84%

In addition to the State bond issuance charge described above, an annual charge equal to 0.3% (30 basis points), payable in monthly installments, must be paid to the Department of Health for inspection, regulation, supervision and audit costs associated with bonds or notes issued to finance certain health care facilities (typically facilities that require the approval of the Commissioner of Health). (See 10 NYCRR § 400.24.) However, the 2014-15 State Budget eliminated PAL § 2976-a, which required a fee to be paid to the New York State Commissioner of Health in an amount equal to 0.9% (90 basis points) of the principal amount of such bonds or notes.

D. LIMITATIONS ON FINANCIAL ASSISTANCE AND IDA POWERS

While it is the purpose of an IDA to promote the economic welfare and prosperity of a Benefited Municipality's inhabitants and to actively attract and encourage the development of such activities, Article 18-A of the Act does place some restrictions on an IDA's ability to participate in certain types of projects. In addition, there are certain statutorily required prerequisites an IDA must comply with prior to undertaking a project.

This section is intended to highlight certain sections of GML that must be addressed prior to commencing any project for which IDA assistance is sought. Despite these requirements, the vast majority of projects, whether new construction, expansion, renovation or equipment acquisition, will qualify for IDA assistance.

1. The Reform Act – Provisions from the 2013-14 State Budget effective March 28, 2013

The Reform Act amended the General Municipal Law (GML) in an attempt to increase accountability and improve the efficiencies and transparency of the operations of Industrial Development Agencies (IDAs) by mandating the adoption of standardized procedures. The Reform Act requires each IDA to adopt the following: (a) a standard application form; (b) a resolution specifying the criteria by which an IDA will evaluate projects; (c) a standard project agreement; (d) a recapture policy; and (e) a policy by which the IDA annually assesses the progress of outstanding projects.

a. Standard Application Form

As part of the standard application form, the applicant must submit basic project information such as "the proposed location and the purpose of the project," the "amount and type of financial assistance being sought" and detailed employment figures associated with the project – including how many jobs will be created and retained, what the timeframe would be for employment, and salary ranges.

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b. Resolution Specifying Evaluation Criteria

Under the Reform Act, an IDA must develop and adopt by resolution certain criteria for the evaluation and selection of projects for which financial assistance must be provided. The statute also requires that the IDA engage in a written cost and benefit analysis for each project.

c. Standard Project Agreement

Similar to the standard application form, the standard project agreement should include a brief description of the project and the type of financial assistance being provided by the IDA. If the financial assistance project includes a Payment-In-Lieu-Of-Tax Agreement (PILOT), the project agreement must specify the dates on which the PILOT payments will be made.

d. Recapture Policy

IDAs are required to develop policies for the discontinuance, suspension or modification of financial assistance. Although the Reform Act provides examples of certain conditions that may be considered a violation of an IDA's recapture policy, the statute largely leaves the development and creation of the policy subject to IDA discretion.

e. Re-Evaluation Policy

The Reform Act now requires IDAs to annually assess each project it provides financial assistance to and provide annual progress reports to each board member. Because the Reform Act does not apply retroactively, certain projects may be excluded from this requirement.

2. Public Hearing Required

Section 859-a of the Act requires IDAs to hold a public hearing with respect to any proposed project that would provide more than $100,000 in financial assistance. The hearing must be held within the municipality that the proposed project will be located in and present the application for financial assistance, additional details relating to the project and the estimated amount of the financial assistance being contemplated by the IDA, including a cost-benefit analysis. The IDA must give at least 10 days published notice of the public hearing, and a notice must be provided to the CEO of each affected tax jurisdiction. When a tax-exempt bond is being issued, a hearing is required on 14 days published notice under the Code. These hearings are generally combined.

3. Commercial Projects

GML § 854(4) defines the categories of "projects" eligible for IDA assistance as any land, building, improvement or facility that is suitable for "manufacturing, research, commercial or industrial purposes or other economically sound purposes." Courts have interpreted "project" as an "all embracing" term encompassing any number of projects.[8] With respect to commercial projects, the New York State Comptroller's Office has opined that the word "commercial" denotes a trade or profit making activity, and courts have similarly found projects are commercial where they are a profit-making business that will create jobs and promote economic prosperity in the area in keeping with the purposes of the IDAs.[9] Generally, the Act provides that the purpose of IDAs are to encourage and assist in the development of projects which promote employment opportunities and prevent economic deterioration in the area served by the IDA.

4. Projects Benefitting Continuing Care Retirement Communities

GML § 859-b requires special procedures to be undertaken where an IDA project will benefit a continuing care retirement community. Project applicants seeking financial assistance in the form of tax-exempt financing must present to the IDA a completed application for a certificate of authority and documentation establishing the continuing

[8] For example, in Wegmans Food Markets, Inc. v. Dept. of Taxation and Fin. of the State of New York, 126 Misc. 2d 144 (Sup Ct 1984), affd, 115 A.D.2d 962 (4th Dept 1985), the court determined that the term "project" under GML § 854(4) was made "all-embracing"

[9] For example, in Nearpass v. Seneca County Industrial Development Agency (Seneca County Index No. 49939), the court determined that the del Lago Resort & Casino, consisting of a 95,000 square-foot casino with approximately 85 gaming tables and approximately 2000 slot machines, plus an additional 75,000 square feet of support and back-of-house space, a six-story approximately 153,000 square foot hotel containing approximately 205 rooms, an approximate 12,500 square-foot state-of-the-art full-service spa, and approximately 2500 square-feet of pool area, an assortment of restaurants totaling approximately 28,000 square-feet, approximately 40,000 square-foot event center, approximately 4,000 square-foot child care center, concierge service, and a parking garage, was a commercial project because it is a profit-making business that will create jobs and promote economic prosperity in the area. The court also determined that the project was a recreation facility because it will provide recreational and leisure activities to its visitors.

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care retirement community council's approval of that application, pursuant to Article 46 of Public Health Law ("PHL"). In addition, at the request of the IDA, the applicant shall present an analysis of project impacts that takes into account the parameters set forth within the IDA's UTEP, which is required pursuant to GML § 874. Applicants must also present the IDA with a financial feasibility study, including a financial forecast and market study, and the analysis of economic costs and benefits required by Article 46 of PHL.

All required documentation must be made available to the public at the time of publication of the notice of the public hearing for the project, during regular office hours in at least two locations, at least one of which shall be in the city, town or village within which the proposed project is located. The public hearing notice must include a statement indicating the location and times of availability of the required documentation.

Pursuant to GML § 862-a(2)(a), IDAs may not adopt any resolution authorizing any financial assistance, including the issuance of bonds, notes or other obligations, for the benefit of a continuing care retirement community unless and until the project has received a certificate of authorization pursuant to PHL § 464-a. Furthermore, the IDA may not undertake the project unless it will serve the public purposes of the Act by preserving permanent, private-sector jobs or increasing the overall number of permanent, private-sector jobs in the State.

5. Retail Facilities

Under § 862-a of GML, an IDA is limited in its ability to provide financial assistance to projects where facilities "that are primarily used in making retail sales to customers who personally visit such facilities constitute more than one-third of the total project cost."[10] This retail restriction does not apply to "tourism destinations," which are defined as locations or facilities likely to attract a significant number of visitors from outside the economic development region in which the project is located. "Economic Development Regions" are defined by the Economic Development Law. A map of the State's Economic Development Regions is located inside the back cover of this Handbook.

The retail restriction may be overcome where, based upon an application, an IDA finds that: (i) the predominant purpose of the project is to make available goods or services which would not be, but for the project, reasonably accessible to residents of the municipality where the project is located; or (ii) the project is located within a "highly distressed area" as defined in § 854(18) of GML. Projects located in a former Empire Zone qualify as being in a highly distressed area; note that there are several other methods to establish an area with this definition.

The IDA must make an additional finding for projects listed in (i) or (ii) above; that the project will preserve permanent, private-sector jobs or increase the overall number of permanent private-sector jobs in the State. This finding, once adopted by the IDA, must also be confirmed by the CEO of the municipality for whose benefit the IDA was created. This confirmation must be made by the CEO, as defined within § 2(5-a) of the Local Finance Law, of the Benefited Municipality.

IDA boards, staff and committees are encouraged to review these restored provisions and consider revisions to existing policies and procedures, including forms of applications and, to the extent appropriate, an Agency's Uniform Tax Exemption Policies ("UTEP"). Further, IDAs are encouraged to work closely with retail applicants to secure market studies and other supporting information to bolster an IDAs finding that a project constitutes a tourism destination and/or will provide a unique product or service to the residents of the municipality within which the project will be located.

6. IDA Investment, Procurement and Gift Restrictions

Investment of Surplus Funds. GML § 858-a states that deposits and investments made by an IDA are subject to the provisions of GML §§ 10 and 11, which govern cash flow management practices of local governments in the State. The term "local government" is defined to include IDAs. (See GML § 10(1)(a).) These statutory provisions were enacted for the purpose of establishing uniform standards for the deposit and investment of municipal moneys. (Ch. 464, L. 1954; Ch. 708, L. 1992). IDAs were included within the definition of "local government" for purposes of this regulatory scheme as a part of the IDA Reform Act of 1993. (Ch. 356, L. 1993.) This legislative framework provides uniform standards to which local governments must adhere when depositing and investing public moneys. In essence, these uniform standards serve to eliminate any risk factor associated with both the deposit and investment of public moneys. The governing board of an IDA shall designate by resolution one or more banks or trust companies for the deposit of moneys; such resolution shall also specify the maximum amount

[10] As of January 2008 the limitation concerning retail facilities sunset with the Civic Facility authority; however most IDAs have adopted these limitations as part of their UTEP and these limitations were restored with the 2013-2014 State Budget with additional IDA References.

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of money that can be on deposit at a time at each bank or trust company (GML § 10(2)(a)).

Generally speaking, the governing board of an IDA, or a delegate thereof, may temporarily invest moneys not required for immediate expenditure in special time-deposit accounts or certificates of deposit (hereinafter, "Deposits") with a bank or trust company located and authorized to do business in the State. (See GML § 11(2)(a).) In addition, an IDA may invest moneys not required for immediate expenditure in: (i) obligations of the United States of America (the "USA"); (ii) obligations guaranteed by agencies of the USA where payment of principal and interest are guaranteed by the USA; (iii) obligations of the State; and, with the approval of the Office of the State Comptroller, (iv) tax anticipation notes and revenue anticipation notes issued by any municipality, school district or district corporation within the State pursuant to §§ 24 and 25, respectively, of the Local Finance Law of the State. (See GML § 11(3)(a)(1).)

The terms "bank" and "trust company" are defined to have the same meanings as set forth within the Banking Law of the State. The term "bank" may also include a national banking association located and authorized to do business in the State. Trust companies, as the term is defined, must also be located and authorized to do business in the State. (See GML § 11(1), referring to GML §§ 10(1)(d) and (e).)

Any Deposits made by an IDA must be payable within such time as the IDA may be required to meet expenditures for which the moneys were obtained. Furthermore, and of significant importance, any deposits in excess of the amount insured by the Federal Deposit Insurance Act must be secured in conformance with GML §10(3)(a), which requires: (i) a pledge to the IDA of eligible securities equal to the deposit, together with a security agreement from the bank or trust company; and/or (ii) an eligible surety bond payable to the IDA in an amount equal to the deposit; and/or (iii) an eligible letter of credit payable to the IDA in an amount equal to 140% of the deposit, plus negotiated interest, if any; and/or (iv) an irrevocable letter of credit issued in favor of the IDA by certain Federal home loan banks in an amount equal to 100% of the deposit, plus negotiated interest, if any. (See GML § 10(3)(a) and (c).)

The terms "eligible securities," "eligible surety bond" and "eligible letter of credit" are defined within GML § 10(1). The necessary provisions of the required security agreement are set forth in GML § 10(3)(a).

Procurement. GML § 884 exempts IDAs from the public bidding and procurement requirements normally associated with public projects. (See GML § 103.) However, any goods or services procured by an IDA for its own use and account must be acquired pursuant to GML § 104-b.

Gift Powers. While the "gift clause" contained within Article VIII § 1 of the State Constitution specifically prohibits municipalities from making gifts or loans to private entities, this prohibition does not extend to public benefit corporations. However, the powers of public benefit corporations are limited to those granted by statute. Article 18-A of the Act specifically empowers IDAs to accept gifts, but no power has been granted to extend gifts to others. (See OSC Opinions 91-32 and 99-4 for relevant discussions.) In sum, IDAs are not empowered to make outright gifts to either public or private entities; however, services and funds may be expended by an IDA without equitable consideration in connection with the undertaking of a proper IDA project. The prohibition on IDA provision of gifts and loans of IDA funds was discussed and emphasized by the Office of the New York State Attorney General in Formal Opinion 2014-F1.

7. Note Regarding Civic Facility Legislation

As noted above, IDA authority to finance or participate in "civic facility" (not-for-profit) projects has remained in expired status since January 31, 2008. We recommend the IDA coordinate its activities with a local development corporation to provide tax exempt bonding for not-for-profits and other forms of financial assistance when the IDA is unable to provide.

8. Note Regarding Moratoria and Application Acceptance

IDAs can impose moratoria on the acceptance of new applications as they are developing and reevaluating uniform criteria and policies. This allows agencies to preserve the status quo and take the time to study and make considered decisions regarding the need to adopt or amend application provisions. In the land-use context, development moratoria are generally considered valid exercises of the police power as long as they are rationally related to public health and safety issues and are limited to a reasonable duration. Land use moratoria are subject to these limitations in order to avoid takings violations, but IDA application moratoria are subject to a more lenient standard because IDA applicants lack any protected property rights or entitlement to IDA benefits.

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LOCAL DEVELOPMENT CORPORATIONS ("LDCS")

BY JUSTIN S. MILLER

Economic development projects in New York often involve a local development corporation ("LDC"). In fact, use of LDCs pre-dates the existence of IDAs, and is often the vehicle through which local economic development is conducted. LDCs are formed and empowered to conduct certain projects pursuant to Not-For-Profit Corporation Law ("N-PCL") § 1411.[11] LDCs were frequently formed by local business or civic leaders to administer a revolving loan fund. The State legislature authorized the formation of LDCs in 1967 to enable municipalities to dispose of municipal land balancing issues other than "highest responsible bidder," which normally governs municipal real property sales, and to access funding for economic development.

LDCs are predominately formed by, and work closely with, municipalities and IDAs by providing not only greater transactional flexibility for undertaking economic development projects, but also added liability protection because the LDC is a bankruptcy remote entity.

Distinguished from IDAs (which exist as public benefit corporations formed by State legislation), LDCs can be formed by anyone over the age of 18 and are established as charitable corporations that are empowered to construct, acquire, rehabilitate and improve, for use by others, industrial or manufacturing plants in the territory in which its operations are principally to be conducted (a "Benefited Territory") and to make loans. LDCs can provide financial assistance for the construction, acquisition, rehabilitation, improvement and maintenance of facilities for others in its Benefited Territory. Specific LDC powers include the ability to: (i) disseminate information and furnish advice, technical assistance and liaison services to Federal, State and local authorities; (ii) to acquire by purchase, lease, gift, bequest, devise or otherwise, real or personal property; and (iii) to borrow money and to issue negotiable bonds, notes and other obligations. LDCs are also uniquely empowered not-for-profit corporations because, without leave of a court, LDCs are empowered to sell, lease, mortgage or otherwise dispose of or encumber facilities or any real or personal property or any interest therein upon such terms as they may determine.

Of particular importance is the LDC's ability to directly acquire real property from municipalities without the need for public bidding or full market value consideration. (See N-PCL § 1411(d)(2).) Notwithstanding the liability protections that may be afforded by building a bankruptcy-remote entity into a development project, the LDC's ability to

[11] This section is attached as Appendix B.

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acquire realty is a unique asset. More often than not, economic development efforts are significantly hindered by traditional constraints on municipally owned realty. This special power granted to municipalities for the disposition of realty has become a crucial element in sophisticated economic development projects undertaken in recent years.

LDCs also offer great latitude to development professionals because they do not require special legislation to be created. However, great care must be employed when LDCs are formed because their structure and membership will dictate how the entity must undertake day-to-day business operations. Because these entities are quasi-governmental in nature and often exist specifically to lessen the burdens of government, the make-up of an LDC's membership and board of directors can subject it to New York's open government laws, including the Open Meetings Law and the Freedom of Information Law ("FOIL"). (These topics are discussed in detail herein under the State Agencies, Incentives and Laws section, below.)[12].

LDCs can provide financial assistance packages to developers similar to those provided by IDAs, except that LDCs are not specifically exempted from real property taxes (See RPTL § 420-a), and therefore cannot provide a real property tax exemption or related PILOT. Hence, the IDA PILOT structure cannot be employed by an LDC without involvement of the IDA. Despite this, LDCs can provide significant project savings through mortgage recording tax exemptions (See Adv. Op. Comm. T&F, TSB-A-95(16)-R and TSB-A-97(7)-R and sales and use tax exemptions.) (See Tax Law § 1116(a)(4).)

Generally, LDCs may provide financial assistance in the form of exemptions from mortgage recording taxes and/or sales and use taxes. (These exemptions are more specifically detailed in A and B, below.) N-PCL §1411(f) states that "the income and operations of corporations incorporated or re-incorporated under this section shall be exempt from taxation." Based on § 1411(f), the commissioner of the Tax Department (the "Commissioner") has indicated in several advisory opinions that the involvement of an LDC in the construction and/or finance aspects of a qualifying project may allow for an exemption from sales and use taxes and/or mortgage recording taxes. (See TSB-A-93(13)-R, TSB-A-95(16)-R, TSB-A-97(7) R, and TSB-A-97(54)-S.) However, it should be noted that the facts and circumstances set forth within each of these advisory opinions are unique and that the use of an LDC should be carefully structured to assure that the exemptions sought are proper and obtainable. The LDC mortgage tax exemption, with respect to the MTA or other transportation district percentage of the mortgage tax, may not be available unless the LDC signs a separate mortgage from the IDA.[13]

A. NEW YORK STATE MORTGAGE RECORDING TAX EXEMPTION

Section 252 of the Tax Law contains the codified and generally recognized exemptions from State tax imposed in connection with the recording of mortgages. While this statute does not contain a specific exemption for entities incorporated or re-incorporated under N-PCL § 1411, several advisory opinions have nonetheless granted exemptions for LDCs acting as either mortgagor or mortgagee. (See advisory opinions noted above.) In TSB-A-93(13)-R, the Commissioner found that, although § 252 of the Tax Law does not specifically exempt LDC mortgages and further states that there will be no exemptions other than the ones provided by that statute, the recording of mortgages issued by various public authorities were exempt. In that case, the Commissioner reasoned that since the petitioner (Empire State Certified Development Corporation) was re-incorporated under N-PCL § 1411 and that N-PCL § 1411(f) provides that the income and operations of LDCs are exempt from taxation, mortgages given to or by the petitioner are exempt from mortgage recording taxes. The Commissioner made similar findings within TSB-A-95(16)-R and TSB-A-97(7)-R. It should be particularly noted that in TSB-A-97(7)-R, the Commissioner found that no mortgage

[12] For example, the Buffalo Enterprise Development Corporation had a board make-up and conducted its activities in a manner that caused it to be subject to the Open Meetings Law and FOIL. (See Matter of Buffalo News v. Buffalo Enter. Dev. Corp., 84 N.Y.2d 488 (1994).) In contrast, the Saratoga Economic Development Corporation had a board make-up and conducted its activities in a manner that caused it to be exempt from the Open Meetings Law and FOIL. (See Matter of Farms First v. Saratoga Economic Dev. Corp., 222 A.D.2d 861 (1999).)

[13] In 2018, Harris Beach attorneys form NYS Economic Development, Inc. ("EDI"). EDI completed its first project in 2024 involving a regionally segment project unable to access financial assistance from the local IDA or local LDC. EDI has changed its name to Economic Development Partners, Inc. ("EDPI") and the entity is led by former IDA executive directors. EDPI has applied to the IRS for a 501(c)(3) determination so the EDPI can provide counseling services and dropdown 501(c)(3) project entities. EDPI mission is to augment local IDA and LDC entities and will not compete with them.

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recording tax is due where an LDC participates as mortgagor.

Based on the foregoing, it appears as though either an existing or newly formed LDC could participate as mortgagor with the company for the purpose of providing an exemption from Article 11 taxation on the recording of mortgage(s) on the project. This financial assistance could be provided by an LDC, based upon the general LDC powers to (i) acquire real and personal property, and (ii) mortgage its interests therein.

B. NEW YORK STATE SALES AND USE TAX EXEMPTIONS

The imposition of sales and compensating use taxes in New York State is governed by Article 28 of the Tax Law. Section 1116 of Article 28 sets forth organizations that are exempt from the sales and compensating use tax as, "any corporation ... organized and operated exclusively for ... charitable ... purposes ... no part of the net earnings of which inures to the benefit of any private shareholder or individual ...". (See Tax Law § 1116(a)(4).) It is important to note that the sales and use tax regulations define "charitable" to include, "lessening the burdens of government." (See 20 NYCRR Part 529.7(e)(1)(ii).) The exemption afforded to charitable organizations, however, is not automatic. Rather, the applicable sales and use tax regulations provide that, "an organization is not exempt from tax because it is organized and operated as a nonprofit organization or because it appears to meet the requirements of this section. In order to establish exempt status, it is necessary to file a completed application as set forth in subdivision (f) of this section and prove that the organization meets the statutory requirements." (See 20 NYCRR Part 529.7(a)(2).)

The application to secure a State sales tax exemption pursuant to Tax Law § 1116(a) is made with State Form ST-119.2. Successful applicants are issued an Exempt Organization Certificate and, thereafter, the applicant's purchases are exempt from sales and use taxes. Among other things, the application form requests submission of an exemption determination letter from the IRS 501(c)(3) Exemption Letter, or "IRS Determination." It appears as though an application may still be made if an IRS Determination has not been applied for or received by the applicant; however, because the application requires a significant amount of organizational and project information to be provided in its place, applications unaccompanied by an IRS Determination will likely garner greater scrutiny by the State Department of Taxation and Finance and the State may attempt to defer its decision until the IRS acts.

The Commissioner has consistently issued advisory opinions allowing the issuance of an Exempt Organization Certificate where an LDC meets the requirements of Tax Law § 1116(a)(4), 20 NYCRR Parts 529.7(a)(2) and 529.7(f). (See TSB-A-97(54)-S, granting exemption to Greater Syracuse Business Development Corporation, hereinafter, the "GSBDC Advisory Opinion".) In the GSBDC Advisory Opinion, the Commissioner found that because N-PCL § 1411(a) states that LDCs are to be established and operated for "exclusively charitable or public purposes," the "charitable" requirements of Tax Law § 1116(a)(4) are met. The GSBDC Advisory Opinion notes that Tax Law § 1116(a)(4) does not explicitly include "public purposes." Nonetheless, the Commissioner in that case interpreted the exemption definition to match LDC purposes[14].

The GSBDC Advisory Opinion notes two distinct means by which an entity that has been granted an Exempt Organization Certificate may secure the exemption from sales and use taxes for purchases of otherwise taxable items: (1) the Agency Contract Exemption, and (2) the Capital Improvement Exemption (discussed below).

1. Agency Contract Exemption

First, an exempt organization may appoint a contractor or agent to purchase taxable items on its behalf where an agency contract between the exempt entity and the contractor conforms to the requirements set forth within 20 NYCRR Part 541.3(d)(4) (the "Agency Contract Exemption"). This regulation states that all purchases pursuant to a qualifying agency contract are exempt as long as the property and services are purchased by the contractor or subcontractor as agent for the exempt organization. In order to create a principal/agent relationship, all of the following conditions must be met:

A. purchases must be billed or invoiced by the vendor to the exempt organization, or to the contractor, specifying that the contractor is acting as agent for the exempt organization (e.g., X contractor, as agent for Y, name of exempt

[14] Any ambiguity regarding whether an LDC is a "charitable" entity has been clarified with the enactment of the Nonprofit Revitalization Act of 2013, which, defines an LDC as a "charitable corporation." (See N-PCL § 1411(b).)

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organization), and identify the place of delivery.

B. payment must be made by the exempt organization, or by the contractor acting as agent, directly to the vendor from a special fund created by the exempt organization for this specific purpose;

C. deliveries must be made to the job site; or under certain circumstances (such as where the materials require additional fabrication before installation on the job site or for storage to protect the materials from theft or vandalism prior to installation at the job site), deliveries may be made to a site other than the job site, providing the ultimate delivery of the materials is made to the job site. Where delivery is made to a site other than the job site, the purchases must be billed or invoiced by the vendor to the exempt organization or to the contractor as agent, identify the place of delivery, the exempt organization's full name and address and the job site location where the materials will ultimately be delivered for installation; and

D. the contractor must furnish the vendor with the exempt organization certification when acting as agent for such organization. A statement signed by a responsible officer of the exempt organization which identifies the contract and the contractor as agent for the exempt organization must be either made on the exempt organization certification or appropriately attached thereto. (See 20 NYCRR Part 541.3(d)(4).)

The contract with the agent must completely comply with these requirements. If it is subsequently determined that the contract does not qualify as an agency contract, the contractor will be liable for the relevant sales tax. (See 20 NYCRR Part 541.3(d)(4)(iii).) However, the purchase of materials that are incorporated into the structure of the real property would be exempt (with proper documentation) under the Capital Improvement Exemption.

2. Capital Improvement Exemption

Second, the Commissioner noted that whether or not an exempt organization enters into a qualified Agency Contract, the purchase of materials incorporated into real property owned by the exempt organization as a capital improvement is exempt from sales and use tax, providing proper exemption documentation is given to the vendor of the materials (the "Capital Improvement Exemption"). Pursuant to Tax Law § 1115(a)(15) and (16), tangible personal property sold to a contractor, subcontractor or repairman for use in altering, improving, erecting or adding to a structure or building, or in maintaining, servicing or repairing real property, property or land of an organization that has secured an Exempt Organization Certificate is not subject to sales and use tax where such tangible personal property becomes an integral component part of such structure, building or real property. Where a sales tax exemption is sought using this Capital Improvement Exemption, contractors are required to issue a properly completed contractor exempt purchase certificate (Form ST-120.1) to affected suppliers when making purchases.

Therefore, if the LDC were to establish an exemption under Tax Law § 1116(a)(4), tangible personal property sold to a contractor, subcontractor or repairman for incorporation into the project would not be subject to sales and use tax if the LDC owns the project at the time the personal property is acquired and installed. It is important to note that purchases will not qualify for exemption under § 1115(a)(15) or § 1115(a)(16) if an exempt organization has only a leasehold interest. (See 20 NYCRR Part 528.16, Ex. 3.) Therefore, fee title will have to be conveyed to the LDC in order to obtain a sales tax exemption.

Section 528.16 of the New York Taxation and Finance Regulations (the "Regulations") notes that in order for the materials to be exempt, the exempt organization must own the land and (the rights to) the structure prior to the construction or improvement project. A contractor is not eligible for the exemption if the structure is first built and then sold to an exempt organization, even if such sale is pursuant to a pre-construction contract. (See 20 NYCRR 528.16, Ex. 2 & 4.) Equipment rentals are subject to tax, as are materials used to build forms that do not become part of the structure. (See 20 NYCRR 528.16, Ex. 5 & 6.)

Section 528.17 of the Regulations concerns the exemption for tangible personal property sold to contractors, subcontractors or repairmen for use in the repair of an exempt organization's real property. In order for such property to be exempt from sales tax, it must become "an integral component of such structure, building, or real property." (See 20 NYCRR 528.17.) The Regulations illustrate this principle by using the example of a painter who

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uses masking tape to line a building's windows before painting. Because the tape will not become an integral part of the real property, it is subject to tax.

It is possible that a court could impose a limited interpretation on an LDC's power to construct, acquire, rehabilitate and improve facilities for use by others. N-PCL § 1411(c) states that these powers are specifically conferred in connection with industrial or manufacturing plants only. Likewise, the companion powers granted to LDCs are similarly limited to industrial or manufacturing plants. If literally interpreted, LDC powers may not be broad enough to construct, acquire, rehabilitate and improve general commercial, retail or housing facilities. However, N-PCL § 1411(i) states that:

> Corporations incorporated or reincorporated under this section shall be organized and operated exclusively for the purposes set forth in paragraph (a), shall have, in addition to the powers otherwise conferred by law, the powers conferred by paragraph (c) and shall be subject to all the restrictions and limitations imposed by paragraph (e) and paragraph (g). In so far as the provisions of this section are inconsistent with the provisions of any other law, general or special, the provisions of this section shall be controlling as to corporations incorporated or reincorporated hereunder.

Because it refers to the purposes in § 1411(a), which (unlike the powers in § 1411(c)), are not limited to industrial and manufacturing plants, the catch-all provision in N-PCL § 1411(i) may be sufficient to allow LDCs to undertake the construction, acquisition, rehabilitation and improvement to facilities other than industrial and manufacturing facilities. If LDC powers to construct, acquire, rehabilitate and improve facilities are limited to industrial and manufacturing projects, the Agency Contract Exemption would not be available to the company for a non-manufacturing or non-industrial project. If an LDC is not properly empowered to undertake the project, then an LDC would not be empowered to appoint a company to do the same on its behalf. However, the Capital Improvement Exemption may still be available where an LDC simply owns the project, but grants a license or lease to the company, allowing the improvements to be constructed by the company on its own behest and behalf. Under this scenario, an LDC with an Exempt Organization Certificate would simply own the land and have title to the improvements. This simple arrangement should be sufficient to secure both the mortgage recording tax exemption and the sales tax exemption via the Capital Improvement Exemption.

Where a municipality, IDA, developer, or any combination thereof, pursues economic development on a proactive basis (for example, the creation of an industrial park and/or taking over existing facilities), we often recommend the formation of a new LDC to shield the municipality and/or IDA from unknown liabilities. This option is essential where an IDA either is not available or is unwilling to undertake a particular project. Where an IDA is available, we then consider whether an IDA straight lease transaction (or even a tax-exempt bond transaction) should be employed to supplement or replace the financial assistance that is available through the LDC.

*NOTE REGARDING THE NON-PROFIT REVITALIZATION ACT OF 2013

As of July 1, 2014, the Non-Profit Revitalization Act of 2013 took effect (the "Revitalization Act"). The Revitalization Act was enacted to "reduce unnecessary and outdated burdens on notprofits" and to "enhance notprofit governance and oversight to prevent fraud and improve public trust." The following list highlights some of the provisions which specifically impact LDCs:

- LDCs are defined as "charitable corporations" (See N-PCL § 1411(c));
- LDCs must adopt a conflict-of-interest policy requiring (at a minimum):
    - A definition of what constitutes a conflict of interest;
    - Procedures for disclosing a conflict of interest to the audit committee or board;
    - A prohibition against any attempt by the person with the conflict of interest to influence improperly the deliberation or voting on the matter giving rise to such conflict; and
    - A requirement that the existence and resolution of the conflict be documented in the LDC's records, including the minutes of any meeting at which the conflict was discussed or voted upon. (See N-PCL §§ 715-a(a)&(b));
- All LDC directors must submit an annual, written statement to the secretary of the LDC disclosing any potential conflicts (See N-PCL § 715-a(c));

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- In the event that an LDC engages in a related-party transaction, the board must:
    - Consider any alternatives to the transaction;
    - Approve the transaction by at least a majority vote of the directors present at the meeting; and
    - Contemporaneously document in writing the basis for the board's approval (See N-PCL § 715(b)).
- In the event that an LDC engages in a related-party transaction, the attorney general may bring an action to enjoin, void or rescind such transaction if it was not reasonable or in the best interest of the LDC at the time it was approved. In the alternative, the attorney general may seek restitution and removal of LDC directors or officers (See N-PCL § 715(f));
- E- mail may be used to transmit board meeting notices (See N-PCL § 605); and
- LDCs seeking to dispose of substantially all of their assets or merge or consolidate may do so utilizing a one-step process (i.e., attorney general approval) rather than the former more cumbersome two-step process requiring attorney general review and court approval. (See N-PCL § 510(3).)

In sum, the Revitalization Act attempts to update and modernize (somewhat archaic) provisions of the Not-For Profit Corporation Law. In doing so, LDCs are burdened with more government oversight. However, LDCs also gain several benefits: (a) the ability to use stream-lined processes; and (b) the ability to utilize modern technologies for simple tasks (i.e., sending electronic notices).

*NOTE REGARDING ECONOMIC DEVELOPMENT PARTNERS, INC

Economic Development Partners, Inc. ("EDPI") is a New York local development corporation that can supplement local assistance by providing inducements in the form of counseling, drop down 501(c)(3) project entities, and, in NYS, a sales and use tax exemption and a mortgage recording tax exemption. EDPI has a board and officers comprised of economic development professionals who understand local economic development issues. EDPI has a policy to offer benefits in coordination with local public agencies. EDPI can provide assistance without a public hearing based on EDPI board approval. The current EDPI board is Judy Seil, Glenn Cooke, Edward Sheeran, Bob Ryan and Julie Marshall. More information is available online at https://ecdevpartners.com/.

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BUSINESS IMPROVEMENT DISTRICT ("BID")[15]

BY SHAWN M. GRIFFIN

A. INTRODUCTION

One economic development tool is a local Business Improvement District ("BID"). BIDs were originally allowed to be established only in cities. However, in 1989, the State, through GML Article 19-A, also gave towns and villages the ability to create a BID. A BID is a special district created by a local municipality to focus on promoting business activity and furthering the revitalization in a downtown or commercial area. A BID is a specific geographic area in which a variety of improvement activities and services are undertaken. A BID is managed by a district management association, which is incorporated under the State not-for-profit law. Its board of directors is made up of property owners and tenants within the BID, with a majority of the board being comprised of property owners from the district.

One of the defining features of BIDs is their ability to raise revenue through special assessment charges on properties in the district. This revenue is used to support programs and services that promote business activity in and revitalize the area of the district. Most BIDs augment this revenue stream with funds from other sources. These can include municipal or county government funding, outside grants, foundation funding, income from events, donations, etc. Many BIDs hire a professional staff, often referred to as "downtown managers," who administer and carry out the BID programs and services.

A BID program is guided by a district plan that describes the organization of the district and the activities to be carried out by the district management association. This plan must be adopted by the legislative board of the authorizing municipality.

The improvements and services provided by the BID are required to supplement, not replace, the services and activities being provided by the local municipality in the district. Local municipalities are required by law to maintain the same level of municipal services in the BID. Therefore, by coordinating and focusing activity in a targeted area and by providing a "higher level of services," the process of economic development and revitalization in the BID can accelerate.

B. BID ACTIVITIES

Article 19-A § 980-c identifies the types of activities that can be carried out by a BID with revenues from the assessment charges.

[15] Information discussed does not pertain to cities with populations of one million or more. Chapter 562 of the Laws of 1990 made changes to Article 19-A.

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First, the BID can undertake the following capital improvements on municipal land or on land owned or leased to the district:

1. construction and installation of landscaping, planting and park areas;
2. construction of lighting and heating facilities;
3. construction of physically aesthetic and decorative safety fixtures, equipment and facilities;
4. construction of improvements to enhance security of persons or property within the District;
5. construction of pedestrian overpasses and underpasses and connections between buildings;
6. closing, opening, widening or narrowing of existing streets;
7. construction of ramps, sidewalks, plazas and pedestrian malls;
8. rehabilitation and removal of existing structures;
9. removal and relocation of utilities and vaults;
10. construction of parking lot and parking garage facilities; and
11. construction of fixtures, equipment, facilities and appurtenances as may enhance the movement, convenience and enjoyment of the public and be of economic benefit to the surrounding properties, such as: bus stop shelters; benches and street furniture; booths; kiosks; signs; etc.

A municipality may issue and sell bonds and other obligations to undertake any of these improvements. In this case, the assessment charge revenue received from the district may be used by the municipality to cover some or all of the resulting debt service costs.

Second, the BID can provide the following additional services to promote business activity and the revitalization of the district:

1. enhanced sanitation services;
2. services promoting and advertising activities within the district;
3. marketing education for businesses within the district;
4. decorations and lighting for seasonal or holiday purposes; and
5. services that enhance the security of persons within the district.

In addition, the law allows the BID to operate and maintain any district improvement and to enter into contracts to construct accessibility improvements that increase public access from public areas to businesses for persons with disabilities. Also, a BID can carry out other improvements and services not listed above. as long as it is funded from a source(s) other than the district assessment charge.

C. THE ASSESSMENT[16]

The district plan must include the method or methods that properties in the district are to be assessed. Generally, there are two basic approaches for assessing properties in the district. The one(s) chosen should best reflect the equitable allocation of costs among all properties in proportion to the benefits they receive.

The first is the ad valorem method. Here, the charge is an amount per $1,000 of the property's assessed valuation. The valuation is based on the assessed value of the property as shown on the most recent assessment roll used for the levy of general municipal taxes. These charges are levied and collected by the municipality in the same manner as that used to collect general municipal taxes. This method is the easiest to administer and is most equitable when the properties in the district are generally of the same size and type.

The second is the benefit-based method. Here a charge is assessed to each property in proportion to the benefits they receive from the services or improvements of the district. Factors to determine the amount of benefit could include the property's type, size, front footage, use, etc. This method works best when properties in the district are of very different sizes, types or uses, or when the district charges are used for services or improvements that disproportionately benefit properties in one part of the district.

[16] A summary of the method(s) that can be used to assess property owners in the BID discussed herein come from information in a publication entitled "Business Improvement Districts" (pages 2-3), prepared by staff of the New York State Conference of Mayors, revised April, 2006.

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The BID may use a combination of these methods if it most equitably assesses the charges to properties in proportion to the benefits received from the BID services and improvements. However, whatever method(s) is used, the annual district charge, excluding any debt service costs, cannot exceed 20% of the total general municipal taxes levied in that year against all taxable properties in the district. And the district charge is included in the municipality's taxing limit imposed by the State Constitution and cannot exceed 10% of that taxing limit.

The district can assess properties that are tax exempt (for property tax purposes) as long as they benefit from the BID improvements or services. However, properties that are exempt from property taxes that do not benefit from the BID services or improvements may be included in the district, but cannot be subject to the assessment charge.

D. THE DISTRICT PLAN

Preparing the district plan is a critical step in the process of establishing a BID. The plan is prepared during the process of establishing the BID and must be approved by the legislative body of the municipality authorizing the district. It describes the BID area by detailing how the BID is to be organized and operated, including the method(s) of assessing properties in the district; and identifies the supplemental services and improvements the district will be carrying out. During the development of the plan, it is critically important to involve the affected property owners from the proposed district, as well as other stakeholders in the community. Once adopted, the plan should be reviewed periodically by the BID organization and by the municipality to assure it remains current and still reflects the needs of the district and the community's goals for revitalization.

Section 980-a of Article 19-A identifies the required contents of the district plan. It must include:

1. a map of the district and description of boundaries of the district so that all lands included in the district are identified;
2. description of present and proposed uses of these lands;
3. proposed improvements and their maximum cost;
4. total annual amount proposed to be expended for improvements, operation and maintenance;
5. proposed sources of financing;
6. proposed timeframe for implementation and completion of the district plan;
7. any proposed rules and regulations applicable to the district;
8. a list of properties to be benefitted and a statement of the method or methods by which the expenses will be imposed upon the benefitted properties, in proportion to their benefit, to defray costs;
9. statement identifying the district management association for the district; and
10. any other matter or item required to be important by the legislative body of the authorizing municipality.

E. ESTABLISHING THE DISTRICT

Before preparing the district plan, the municipality and the downtown business community should assess the pros and cons of establishing a BID. They should examine the needs of the area under consideration and determine what their goals and objectives are for promoting business activity and advancing the revitalization of the area. A number of questions should be examined. What are the resources that are available for revitalization of the area and how will a BID contribute to the effort? What are the specific types of needed improvements and supplemental services that could be undertaken by a BID? Do the benefits of creating a district outweigh the costs and administrative requirements of establishing and operating the district?

Clearly one of the benefits of a BID is the creation of a new revenue stream dedicated to implementing the district plan. However, for some smaller communities, the amount of funds raised through annual assessment charges might be quite small. On the other hand, another advantage of a BID is that it helps organize the revitalization effort in a community. It requires the community's stakeholders -- property owners and tenants and municipal officials - - to come together in a partnership that is committed to promoting and revitalizing the area. Having a formal organizational structure in place can focus the community's effort and help leverage other resources - - both people and money - - in support of a revitalization program.

Formally establishing a BID involves several specific steps, some of which are spelled out in

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GML Article 19-A. The New York Conference of Mayors (NYCOM) has published a guidebook on BIDs that identifies nine distinct steps to establishing a BID[17]:

1. Applying GML Article 19-A to the Municipality. The local legislative body must adopt a local law that applies GML Article 19-A to the municipality. The local law is subject to a permissive referendum. If a valid petition requesting a referendum is received, the referendum must be held and result in a majority vote for the municipality to proceed with setting up a BID.

2. Preparing a District Plan. If a valid petition requesting a referendum is not received or if a referendum on the local law passes, the local legislative body may adopt a resolution authorizing preparation of a district plan. The legislative body determines who should prepare the plan. Costs associated with preparing the plan are the responsibility of the municipality. There is no time limit for preparation of the plan.

3. Adopting a District Plan. Once the district plan is prepared, it must be filed with the municipal clerk's office. The local legislative body may then adopt a resolution that contains: (1) a copy of the district plan and notice that it is on file in the clerk's office and other places for public inspection as determined by the legislative body; (2) a notice of the time and place where the legislative body will hold a public hearing on establishing the BID; (3) a statement that any owner of real property in the proposed BID that is deemed benefitted by the establishment of the district may object in writing within 30 days of the public hearing. The resolution must also state that the BID will not be established if written objections are filed from either: (1) owners of at least 51% of the assessed valuation of all benefitted properties in the proposed BID; or (2) at least 51% of owners of benefitted properties in the proposed district.

4. Notice Requirements. A copy or summary of the resolution must be published at least once in the municipality's official newspaper or a newspaper of general circulation. This must be done at least 10 days, but not more than 30 days, before the public hearing date. Also, a copy or summary of the resolution must be mailed to each owner of real property in the proposed district.

5. Public Hearing. At least one public hearing must be held by the legislative body.

6. Filing Objections. Property owners in the proposed district have 30 days to file written objections to the formation of the BID with the municipal clerk's office.

7. Local Legislative Determination. Thirty days after the public hearing, the legislative body must determine how many objections to creating the BID have been filed. The body must adopt a resolution disapproving the establishment of the district if objections have been filed from either: (1) owners of at least 51% of the assessed valuation of all benefitted properties in the proposed BID; or (2) at least 51% of owners of benefitted properties in the proposed district.

8. If a sufficient number of objections (noted above) have not been filed, the legislative body must determine that: (1) the public notice requirements have been met and are sufficient; (2) that all real property in the proposed district will benefit from its establishment, exempting those that have been included despite their tax exempt status; (3) that all properties benefitting from the district are included in the district; and (4) that the establishment of the district is in the public interest. If these determinations are made, the legislative body may adopt a local law establishing the district.

9. If the legislative body determines that establishing the district is not in the public interest (see element 4 above), the body must adopt a resolution disapproving the establishment of the district. If the body determines that the public notice requirements have not been met or are insufficient, that not all properties in the proposed district will benefit from the district, or

[17] Information is contained on pages 5-11 of "Business Improvement Districts," NYCOM Municipal Management Series, prepared by staff of the New York Conference of Mayors (NYCOM), revised April, 2006.

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that not all of the properties that will benefit from the district are included in the proposed district, then the legislative body must hold another public hearing.

10. If the legislative body decides to amend the district plan by adjusting the proposed boundaries, increasing or reducing the improvements or services in the district as noted in the district plan, or by changing the method(s) of assessment, an additional public hearing must be held.

11. New York State Comptrollers Review. Before the local law becomes effective, the State Comptroller must review the district plan and determine if the municipality's tax and debt limitations will be exceeded by the establishment of the district. The municipality must provide information to the State Comptroller on the amount of its outstanding indebtedness, assessment valuations, property taxes, etc. A form specifying the information that must be submitted is available from the State Comptroller's office. This information must be provided within 20 days after the legislative body adopts the local law. The State Comptroller must notify the municipality of its determination within 60 days after receiving the financial information submitted by the municipality. Upon a favorable determination from the State Comptroller and after the normal filings with the Secretary of State, the local law becomes effective, and the municipality can begin establishing the BID.

12. Final Filing and Notice Requirements. Within 10 days of the law becoming effective, certified copies of the law must be filed in the municipal clerk's office and with the Office of the State Comptroller in Albany. Finally, within two weeks of the filing with the Office of the State Comptroller, a copy or summary of the local law must be published at least once in the municipality's official newspaper or a newspaper of general circulation.

F. IMPLEMENTING THE BID PROGRAM

As noted earlier, a district management association ("DMA") must be created to manage the operations of the BID and carry out the improvements and services noted in the district plan. The DMA must be incorporated under the not-for-profit law of the State. There must be three incorporators representing the mayor/town supervisor or chief executive officer, the chief financial officer of the municipality and the legislative body. The DMA's board of directors must consist of property owners and tenants within the district. However, configured, the board must have a majority of its members representing property owners in the district. The three incorporators who represent the authorizing municipality are also members of the board. The DMA's bylaws or certificate of incorporation must provide for voting representation by both property owners and tenants in the district.

While the daily operations of the BID function independent of the municipality, the municipality does have an important oversight responsibility. It should monitor the activities of the DMA to assure the services and improvements carried out by the BID are consistent with the district plan. In addition to collecting the assessment charge from the property owners and expending these funds to the DMA, the municipality should monitor the financial operations of the BID by reviewing its annual budget, financial statements and audits.

It is recommended that the DMA and the municipality formalize their respective roles and responsibilities in an agreement. This document can clarify other issues and help the DMA carry out its responsibilities consistent with the plan and the needs of the community. Two important provisions are recommended to be included in a DMA-municipal agreement: (1) that any BID employee should not be considered to be a municipal employee for the purposes of civil service requirements and benefits; and (2) that contracting and bidding activities of the BID should reflect the procurement policies of the municipality. This agreement can be a way to formalize the partnership between the municipality and the BID organization and serve as a foundation for ongoing communication and further collaboration.

The strategies for implementing a BID program are contained in the district plan that has been adopted by the municipality's legislative body. As discussed earlier, this plan should be kept current and be revised as necessary to reflect the changing needs in the BID and the activities the BID is undertaking or wishes to undertake. Amending the district plan is required when the BID anticipates providing additional services or improvements, changing the method(s) of assessing the district charge or undertaking other major changes. Revisions to the district plan must

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first be recommended by the DMA and the municipality's legislative body must act to amend the district plan by local law. Before the legislative body approves the local law, a public hearing must be held. To expand the boundary of an existing BID, the same procedures must be followed for establishing the district discussed above, except the local governing body does not have to re-adopt a local law to apply GML Art. 19-A to the municipality.

Many BIDs hire professional staff to carry out their day-to-day work. They typically are hired by and are responsible to the DMA board of directors. Whether to hire staff or not is often a function of the size of the BID and the complexity of its programs and services. In smaller BIDs, professional staff often serve on a part-time basis.

DMAs are subject to the requirements of the Public Authorities Accountability Act of 2005 as amended by the Public Authorities Reform Act of 2009. These requirements are discussed in another section of this handbook.

G. THE MAIN STREET APPROACH

As discussed earlier, the district plan should include the strategy for revitalizing the BID. One well-known and proven approach has been developed by the National Trust For Historic Preservation ("NTHP") and is referred to as the "Main Street Approach."[18] This provides a framework for developing a comprehensive strategy for revitalization of downtown areas and neighborhood commercial centers. According to the NTHP, the approach has four elements.

Organization. This involves establishing an organizational structure to oversee and carry out activities and programs. The structure should be geared to involving the community and its stakeholders in meaningful work to advance of the goals of the organization. A governing structure could be a DMA with a board of directors, which is augmented by standing committees, each with a specific charge and focus. Since many downtown improvement programs have limited resources, the organization could be a mechanism to recruit and involve volunteers. The structure can provide for a continuity of effort over time and help build consensus and cooperation in support of the revitalization program.

Promotion. A positive image of the downtown or commercial area is essential to encouraging consumers, investors and funders to be part of the revitalization effort. Promotion and marketing activities should speak to the assets, attractions and development and investment opportunities in the district. Activities, such as special events, holiday festivals and marketing campaigns can help create a positive image for the business district.

Design. The physical appearance and functioning of the business district have much to do with its attractiveness and economic viability. Enhancing an area's physical appearance should focus on preserving its architectural style and creating a pedestrian friendly environment. The design and scale of new construction should be consistent with, and support, the overall physical appearance and style of the area. Attention should be given to attractive and well-designed street furniture, lighting, signs, plantings, etc. It is essential the district function well for consumers and businesses. As such, parking, as well as vehicular and pedestrian circulation and access, should work together and contribute, not detract, from the overall physical appeal of the business district.

Economic Restructuring. Activities that seek to expand and improve the economic base of the business district are critical to a program's success. Efforts should focus on diversifying and expanding the assets in the district and helping existing businesses increase their competitive position. Traditional economic development tools could be used, including working with existing businesses to stay and expand in the district through the provision of small business counseling and business planning services, as well using economic development incentives as appropriate. Retail recruitment activities should be directed at areas of vacant space, including first floor commercial space. Opportunities for new mixed-use development should be considered. Oftentimes, developing or rehabilitating just one or two larger properties can create a catalytic effect throughout the business district, generating new demand for business activity and development.

Using the Main Street Approach as a framework to develop a revitalization strategy will help assure the program is comprehensive and considers the broad range of activities needed for success. This approach can help communities focus their revitalization program, whether or not they choose to establish a BID.

[18] This is a trademarked strategy, known as the "Main Street Four-Points Approach," developed by the Main Street Center of the National Trust for Historic Preservation.

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RENEWABLE ENERGY: SOLAR & WIND

BY ROBERT J. RYAN

A. REAL PROPERTY TAX EXEMPTIONS

1. Real Property Tax Law ("RPTL") Section 487

RPTL Section 487 provides a 15-year real property tax exemption for solar, wind and certain other renewable energy systems.

"Solar or wind energy system" is defined as "an arrangement or combination of solar or wind energy equipment designed to provide heating, cooling, hot water, or mechanical, chemical, or electrical energy by the collection of solar or wind energy and its conversion, storage, protection and distribution." [19] "Solar or wind energy equipment" is defined as "collectors, controls, energy storage devices, heat pumps and pumps, heat exchangers, windmills, and other materials, hardware or equipment necessary to the process by which solar radiation or wind is (i) collected, (ii) converted into another form of energy such as thermal, electrical, mechanical or chemical, (iii) stored, (iv) protected from unnecessary dissipation and (v) distributed." [20]

Pursuant to RPTL §487, real property that includes a solar energy system will be exempt from taxation to the extent of any increase in the value of the real property by reason of the inclusion of such solar energy system for a period of 15 years.[21] The exemption is only granted upon application filed with the assessor for applicable taxing jurisdictions on or before the applicable Taxable Status Date.[22] Upon approval of the application by the assessor, the assessor is to enter the taxable assessed value of the parcel on the assessment roll with the taxable property, with the amount of the exemption in a separate column.[23]

Practical Note: NYS Form RP-487 is the application that must be filed with the applicable assessor to obtain the §487 exemption. The 15-year exemption period is established by filing Form RP-487 with the applicable assessor on or before the Taxable Status Date, typically March 1. The §487 exemption applies to the solar improvements and does not apply to the land, which will remain on the tax rolls and subject to real property taxation. In addition, the §487 exemption does not apply to special ad valorem levies and special assessments (i.e. special district charges). Therefore, the assessed value of the land and improvements will be subject to special district charges.[24]

Opt-Out. A county, city, town or village may each opt-out of the §487 exemption at any time by adopting a local law, and a school district may opt-out by adopting a resolution, providing that no exemption under §487 shall be applicable within its jurisdiction with respect to any solar energy system that began construction subsequent to the effective date of such local law or resolution.[25] Construction of a solar energy system is deemed to have begun upon full execution of a contract or interconnection agreement with a utility; provided however, if such contract or

[19] RPTL §487(b)
[20] RPTL §487(a)
[21] RPTL §487(2)
[22] RPTL §487(6)
[23] RPTL §487(7)
[24] https://www.tax.ny.gov/research/property/assess/manuals/vol4/pt1/sec4_01/sec487.htm
[25] RPTL §487(8)(a)

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interconnect agreement requires a deposit, then construction shall be deemed to have begun when the contract or interconnection agreement is fully executed, and the deposit is made.[26] Upon execution of the contract or interconnection agreement with a utility, written notification must be provided to the applicable taxing jurisdictions.[27]

Practical Note: Until a contract or interconnection agreement is fully executed with a utility and the deposit is made, if one is required, any taxing jurisdiction can opt-out of the §487 exemption, thereby subjecting the solar energy system to real property taxation. Opt-out laws and resolutions are required to be filed with the NYS Department of Taxation and the New York State Energy Research and Research Development Authority ("NYSERDA").[28] The timing of the notice to the taxing jurisdictions that a contract or interconnection agreement with a utility was executed should be made reasonably contemporaneous with the execution of such contract.

Payment in Lieu of Tax ("PILOT") Agreement. A Village, Town, City, County and School District that has not opted-out of the § 487 exemption each has a right to require a contract for payments in lieu of taxes. The PILOT agreement may require annual payments in an amount not to exceed the amounts which would otherwise be payable but for the § 487 exemption.[29] The PILOT agreement cannot operate for more than 15 years, commencing on the date the exemption first becomes available,[30] which will depend on the filing of Form RP-487 and the Taxable Status Date. An owner or developer of a solar energy system has the option of providing written notification to the taxing jurisdictions of its intent to construct a solar energy system. The notice must be sent to the highest-ranking official of the taxing jurisdiction. Such notice must explicitly reference RPTL § 487(9) and clearly state that unless the taxing jurisdiction responds within 60 days in writing with its intent to require a PILOT, such project will not be obligated to make such payments. If such written notice is provided, then in order for the taxing jurisdictions to require the owner or developer of such system to enter into a PILOT, the taxing jurisdictions must notify the owner or developer of its intent to require a PILOT within 60 days of receiving the written notification (the "60 Day Notice.") [31] A taxing jurisdiction may adopt a law or resolution at any time within, or prior to, the 60-day window indicating the taxing jurisdiction's ongoing intent to require a PILOT; such law or resolution is considered notification to owners or developers and no further action is required on the part of the taxing jurisdictions.[32]

Practical Note: A PILOT agreement may be entered into with a single taxing jurisdiction or multiple jurisdictions if such jurisdictions agree to be signatories on one agreement. Typically, PILOT agreement terms run concurrently with the 15-year property tax exemption but may be less than 15 years. The 15-year exemption period is established by filing Form RP-487 with the Town assessor on or before the Taxable Status Date. The maximum PILOT payment can be what each taxing jurisdiction would have received in taxes, assuming the solar energy system was not exempted under § 487.

2. Industrial Development Agencies ("IDA")

As an alternative to seeking a 15-year property tax exemption through RPTL §487, whereby each taxing jurisdiction has the independent right to require and negotiate a PILOT, a solar or wind developer may seek a PILOT through an IDA. The IDA board and not the taxing jurisdictions have the authority to approve an application and the financial assistance to be granted to such IDA applicant. Additionally, IDA's are not limited to a 15-year PILOT term. Furthermore, IDAs have the authority to grant sales and mortgage recording tax exemptions. As explained below, the State has exempted its share of the sales tax on solar energy system equipment, but the local share is still applicable unless the local taxing jurisdiction opted into the exemption. There is no corresponding State exemption for wind energy systems. Thus, the IDA sales and use tax benefit would cover the applicable local share for solar projects and the full State and

[26] RPTL §487(8)(b)
[27] RPTL §487(8)(b)
[28] RPTL §487(8)(a) See also Laertes Solar, LLC and Cornell University v. Assessor of the Town of Harford, Cortland County, Town of Harford and the Dryden Central School District, Index No. EF17-1018, October 3, 2018.
[29] RPTL §487(9)(a)
[30] RPTL §487(9)(c)
[31] RPTL §487(9)(a)

[32] RPTL§487(9)(b)

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local share for wind projects. Lastly, whenever a county clerk records a mortgage in the State, the mortgagor must pay a .75% to 1.85% (of the mortgaged amount) mortgage recording tax. The IDA has the authority to exempt mortgage recording taxes.

B. SALES TAX EXEMPTIONS

1. Solar – State Exemption with Local Opt-in.

The sales and use tax rates on tangible personal property in the State generally range from 7% to 8.875%, consisting of a 4% State share, and in some cases a Metropolitan Commuter Transportation District[33] ("MCTD") share of 3/8%, with the remainder being the local share. In 2012, legislation was enacted providing a sales and use tax exemption for the receipts from the retail sale and installation of commercial solar energy systems equipment. The exemption applies to the 4% State share and the 3/8% MCTD share, if applicable. The legislation also allows cities and counties to grant a similar exemption from their local share. The law defines "*Commercial Solar Energy Systems Equipment*" as "*an arrangement or combination of components installed upon non-residential premises that utilize solar radiation to produce energy designed to provide heating, cooling, hot water and/or electricity.*"[34]

Practical Note: NYS Tax Publication 718-CS entitled Local Sales and Use Tax Rates on Sales and Installations of Commercial Solar Energy Systems Equipment contains the list of jurisdictions that do not provide the exemption and the resulting tax rate therein, as well as the jurisdictions that do provide the local exemption. A contractor who purchases commercial solar energy equipment would provide the vendor Form ST-120.1 to claim the exemption. Purchasers other than contractors would provide the vendor Form ST-121 to claim the exemption.

2. Production Machinery and Equipment Exemption – Solar & Wind

Tax Law section 1115(a)(12) provides an exemption for machinery or equipment used or consumed directly and predominantly in the production of electricity for sale by generating, but not including, parts with a useful life of one year or less, or tools and supplies used in connection with such machinery or equipment. Parts with a useful life of one year or less, tools and supplies used in connection with such machinery and equipment are exempt pursuant to section 1105-B of the Tax Law. Section 1105-B(b) of the Tax Law also exempts receipts from the services of installing, repairing, maintaining or servicing machinery, equipment, parts, tools and supplies exempt under 1115(a)(12) of the Tax Law from the tax imposed on such services by 1105(c)(3) of the Tax Law. To qualify for these exemptions, the determination is whether the machinery or equipment is used and consumed directly and predominately in the production of electricity for sale by generating. Directly means used in the production phase of the process and predominately is if over 50 percent of its use is directly in the production phase of the process. The determination of which pieces of machinery or equipment qualify depends upon the specific facts. Specifically with solar and wind, determining at which point the generation process ceases and the transmission process begins.

Practical Note: A contractor who purchases Production Machinery and Equipment would provide the vendor Form ST-120.1 to claim the exemption. Purchasers other than contractors would provide the vendor Form ST-121 to claim the exemption.

C. BUY AMERICAN IRON AND STEEL, LABOR PEACE, AND NYS VENDOR PREFERENCE

1. New Section 66-r of the Public Service Law:

Buy American Iron and Steel.

A public entity, such as the New York State Energy Research and Development Authority ("NYSERDA") must include a provision in each contract for the construction of a covered renewable energy system (i.e. greater than 5 MW and involves the procurement of renewable energy credits by a public entity) that the iron and structural steel used or supplied in the performance of the contract, and which is permanently incorporated into the project (i.e. product that is required to remain in place to the end of the project contract, in a fixed location, affixed to the system to which it was incorporated), is made in whole, or in substantial part, in the United States, its

[33] New York City, Dutchess County, Nassau County, Orange County, Putnam County, Rockland County, Suffolk County and Westchester County are in the MCTD.

[34] Tax Law §1115(ii), TSB-M-12(14)(S)

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territories or possessions. Further, in the case of structural iron or structural steel, all manufacturing must take place in the United States from the initial melting stage through the application of coatings, except metallurgical processes involving the refinement of steel additives.

- The public entity contracting for the construction of a covered renewable energy system may determine that the buy American provisions:
  - Would not be in the public interest;
  - Would result in unreasonable costs;
  - Would increase the contract by an unreasonable amount;
  - Such iron or steel cannot be produced or made in the US in sufficient and reasonable available quantities and of satisfactory quality.
- The Buy American provisions will not apply if the public entity makes such determination.
- The public entity must include this determination in any advertisement or solicitation of a proposal for the construction of a covered renewable energy system.

Labor Peace Agreement

The Public Service Commission must require the owner of a covered renewable energy system, as an ongoing condition of any renewable energy credits agreement with a public entity, to stipulate to the fiscal officer that it will enter into a labor peace agreement with at least one bona fide labor organization, where such organization is actively representing employees providing necessary operations and maintenance services for the system at the time of such agreement, or upon notice by a labor organization that it is attempting to represent employees who will provide necessary operations and maintenance services for the system. The legislation defines a "labor peace agreement" as an agreement between an entity and labor organization that, at a minimum, protects the State's proprietary interests by prohibiting labor organizations and members from engaging in picketing, work stoppages, boycotts and any other economic interference with the relevant renewable energy system.

New York State Vendors

A public entity seeking competitive proposals for the construction of a covered renewable energy system may give significant consideration in the evaluation process to proposals that will procure equipment and supplies from businesses located in New York State.

2. New Section 224-d of the Labor Law:

Prevailing Wage

Labor Law 224-d provides that all renewable energy system projects with a capacity of one or more megawatts alternating current[35] that involve the procurement of renewable energy credits by a public entity or a third party acting on behalf and for the benefit of a public entity, are subject to the prevailing wage requirements and rules contained in Labor Law 220, 220-a, and 220-b, 223, 224-b, and 227. Section 224-d(3); however, it provides a carve out for construction work performed on an otherwise covered renewable energy system if that construction work is performed under a "pre-hire collective bargaining agreement," a "labor peace agreement," or "project labor agreement" between an owner or contractor and a bona fide building and construction trade labor organization that provides that only contractors and subcontractors who sign the prenegotiated agreement can perform work on the project. In addition to ensuring that laborers, workers and mechanics employed on the job are paid the required level of prevailing wages and supplemental benefits, there are several administrative/procedural requirements that an owner of a covered project must satisfy under the prevailing wage law. These include: (1) requesting a project specific wage schedule (PW 39 can be completed online); (2) ensuring that requiring prevailing wage and other DOL notices are posted on the job site; (3) completing the online Notice of Award (PW16) form; (4) completing the online Notice of Completion/Cancellation of Contract (PW200) form; (5) ensuring that all contracts with general and sub-contractors include a copy of the applicable prevailing wage schedule and require contractors to comply with all provisions of the law; and (6) ensuring that accurate certified payroll records are completed, collected and maintained.

[35] Chapter 372 of the Laws of 2022 amended section 224-d by decreasing the capacity of greater than five megawatts to one or more megawatts. This amendment took effect on July 5, 2022.

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In addition to the prevailing wage requirements, Section 224-d(6) each owner and developer of a covered renewable energy system project must also comply with the objectives and goals of certified minority and women-owned business enterprises (MWBE) pursuant to article fifteen-A of the New York Executive Law, and certified service-disabled veteran-owned businesses pursuant to article seventeen-B of the New York Executive Law. Section 224-d(7)(c) provides the Commission of Labor with the authority to require any owner or developer of a covered renewable energy system project to disclose information on the participation of MWBE contractors and the diversity practices of contractors and subcontractors involved in the performance of work on the project.

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PUBLIC AUTHORITIES' ACCOUNTABILITY ACT OF 2005 ("PAAA") AND PUBLIC AUTHORITIES REFORM ACT OF 2009 ("PARA")

BY ROBERT J. RYAN AND JULIE A. MARSHALL

A. SUMMARY

The Public Authorities Reform Act of 2009 ("PARA"), signed into law by Governor Paterson on December 11, 2009, amends the Public Authorities Accountability Act of 2005 ("PAAA"), which was signed into law by Governor Pataki on January 13, 2006. The primary purposes of PAAA and PARA are to ensure greater efficiency, openness and accountability for New York's public authorities, and establish an independent authorities' budget office. PAAA and PARA seek to accomplish these purposes by establishing comprehensive reporting, auditing, governance and property disposition requirements. The provisions of the PAAA as amended by PARA are in addition to, and do not supersede, any other existing requirements of public authorities. In addition, PARA overhauls the Authority Budget Office established by PAAA and mandates the governor establish a replacement independent authorities budget office ("ABO") to: (i) promulgate rules and regulations; (ii) receive and act upon complaints; (iii) initiate formal investigations in response to complaints or non-compliance; (iv) issue subpoenas pertaining to investigations; (v) publicly warn and censure authorities for non-compliance; (vi) report suspected criminal activity to the attorney general; (vii) compel any non-compliant authority to submit an explanation; (viii) commence special proceedings in Supreme Court seeking an order for the production of documents or information; (ix) develop with the Attorney

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General a written acknowledgement for board members; (x) assess the ability of individual authorities to implement PARA 2009 and set a date for which changes must be implemented by; and (xi) recommend to appointing authority the suspension or dismissal of officers or directors.

B. SCOPE AND APPLICABILITY

1. Definitions (Public Authorities Law § 2).

PAAA and PARA are applicable to "local authorities," defined as:

(a) a local IDA or authority or other local public benefit corporation.

(b) a not-for-profit corporation affiliated with, sponsored by, or created by a county, city, town or village government[36].

(c) a public authority or public benefit corporation created by, or existing under, the Public Authorities Law ("PAL") or any other law of the State whose members do not hold a civil office of the State, are not appointed by the governor or are appointed by the governor specifically upon the recommendation of the local government or governments.

(d) an affiliate of such local authority.

C. REPORTING REQUIREMENTS

1. Annual Reports (PAL § 2800(2))[37]

Within 90 days after the end of its fiscal year, the authority must submit to the CEO, CFO, chairperson of the legislative body of the local government or local governments, and the Authority Budget Office an annual report[38] that must include:

(a) operations and accomplishments;

(b) financial reports, including: (i) audited financials, (ii) grant and subsidy programs, (iii) operating and financial risks, (iv) current ratings, if any, of bonds issued by recognized municipal bond rating agencies and notice of changes in such ratings, and (v) long-term liabilities, including leases and employee benefits plans;

(c) mission statement and measurements, including its most recent measurement report;

(d) schedule of bonds and notes outstanding;

(e) compensation schedule for salaries in excess of $100,000;

(f) biographical information for all persons with salaries in excess of $100,000;

(g) projects undertaken during the past year;

(h) list of real property acquired or disposed of during the year, including the price paid or received and the names of the buyers or sellers;

(i) code of ethics;

(j) assessment of internal controls;

(k) enabling legislation;

(l) description of the authority and its board structure[39] including: (i) committees and members, (ii) board meetings and attendance, (iii) description of major authority units or subsidiaries, and (iv) number of employees;

(m) charter and by-laws;

(n) listing of material changes in operations and programs during the reporting year;

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[36] See also Griffiss Local Development Corp. v. State of New York Authority Budget Office, 26 Misc.3d 815 [2009], where the court held that a development corporation was a local authority subject to PAAA because the LDC was created by the county in cooperation with the city and the redevelopment planning council.

[37] Effective Date: Immediately unless the authority fiscal year begins after January 1, 2006.

[38] Waiver: Upon application by an authority, the new ABO may waive any requirement of § 2800 of the PAL (i.e. Annual Report, website publication, Certification of Annual Report by CEO and CFO) pursuant to regulations promulgated by the ABO, which take into consideration number of employees, annual budget, ability to use existing staff, and other factors. See the ABO Policy Guidance No. 11-01 Compliance Review Process for further guidance, available on ABO's website https://abo.ny.gov/policy-guidance (last visited January 12, 2026).

[39] Personnel Reports: By January 15 of each year a listing of employees, title and salary to OSC, Budget, legislative fiscal committees and ABO. May reference information contained in the annual report if appropriate with any updates as necessary.

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(o) minimum of a four-year financial plan, including: (i) current and projected capital budget, (ii) operating budget report, including an actual versus estimated budget with an analysis and measurements of financial and operating performance;

(p) board performance evaluations, provided, however, that such evaluations shall not be subject to disclosure under FOIL;

(q) description of the total amount of assets, services or both assets and services bought or sold without competitive bidding, including: (i) the nature of assets and services, (ii) names of the counterparts, (iii) where the contract price for the assets purchased exceed FMV or where the contract price for the assets sold is less than FMV, a detailed explanation of the justification for making a purchase or sale without competitive bidding and a certification by the CEO and CFO that they have reviewed the terms of such purchase or sale and determined that it complies with applicable law and procurement guidelines; and

(r) description of material pending litigation.

Every financial report submitted with the Annual Report under PAL § 2800 must be approved by the authority's board and must be certified in writing by the CEO and the CFO of such authority that, based on that officer's knowledge: (i) the information is accurate, correct and does not contain any untrue statement of material fact; (ii) the report does not omit any material fact which, if omitted, would cause the financial statements to be misleading in light of the circumstances under which the statements are made; and (iii) the report fairly presents, in all material respects, the financial condition and results of operations of the authority as of, and for, the periods presented in the financial statements.

2. Website Publication

Each local authority shall make accessible to the public, via its official or shared internet website, documentation pertaining to its mission, current activities, most recent annual financial report, current year budget and its most recent independent audit report, unless such information is exempt from disclosure pursuant to § 87 of the Public Officers Law (FOIL). A more complete list of the information to be posted on a public authority's website can be obtained by contacting the ABO.[40]

3. Budget Reports (PAL § 2801(2))[41]

At least 60 days prior to the commencement of its fiscal year, the authority must submit to the CEO, CFO, chairperson of the legislative body of the local government or local governments and the Authority Budget Office an annual report that must include:

1) budget information on operations and capital construction setting forth the estimated receipts and expenditures for the next fiscal year and the current fiscal year, and

2) actual receipts and expenditures for the last completed fiscal year.

D. AUDIT REQUIREMENTS (PAL § 2802(2))[42]

1. Report

The authority must submit, along with the Annual Report required by PAL §2800(2) (see above), a copy of the annual independent audit report (performed by a certified public accounting firm in accordance with generally-accepted government auditing standards), a management letter and any other external examination of the books and accounts of the authority, other than examinations made by the State Comptroller, to the CEO, CFO, chairperson of the legislative body of the local government or local governments and the Authority Budget Office.

The authority may exempt from disclosure any information exempted pursuant to § 87 of the Public Officers Law (FOIL).

2. Auditor

The lead audit partner or the audit partner responsible for reviewing the audit cannot have performed audit services for the authority in each of the five previous fiscal years.

The CPA firm performing the audit is prohibited from performing any non-audit services to the

[40] See the ABO Policy Guidance No. 25-2: Website Transparency Requirements and Record Retention for further guidance, available on ABO's website https://abo.ny.gov/policy-guidance (last visited January 12, 2026).

[41] Effective Date: authority fiscal year ending on or after December 31, 2007.

[42] Effective Date: authority fiscal year ending on or after December 31, 2007.

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authority contemporaneously with the audit, unless prior approval is granted by the audit committee. (See paragraph 5(a), below.)

The CPA firm is prohibited from performing any audit service if the CEO, comptroller, CFO, chief accounting officer or any other person serving in an equivalent position for such authority, was employed by the CPA firm and participated in any capacity in the audit of the authority during the one year preceding the date of the initiation of the audit.

E. BOARD MEMBER REQUIREMENTS (PAL § 2824)[43]

1. Responsibilities

(a) execute direct oversight of the authority's chief executive and other senior management in the effective and ethical management of the authority;

(b) understand, review and monitor the implementation of fundamental financial and management controls and operational decisions of the authority;

(c) establish policies regarding the payment of salary, compensation and reimbursements to, and establish rules for the time and attendance of, the chief executive and senior management;

(d) adopt a code of ethics applicable to each officer, director and employee that, at a minimum, includes the standards established in § 74 of the Public Officers Law;

(e) establish written policies and procedures on personnel including policies protecting employees from retaliation for disclosing information concerning acts of wrongdoing, misconduct, malfeasance or other inappropriate behavior by an employee or board member of the authority; investments; travel; the acquisition of real property; the disposition of real and personal property; and the procurement of goods and services;

(f) adopt a defense and indemnification policy and disclose such plan to all prospective board members.

(g) perform each of their duties as board members in good faith and with that degree of diligence, care and skill that an ordinarily prudent person in like position would use under similar circumstances, and may take into consideration the views and policies of any elected official or body, or other person, and ultimately apply independent judgment in the best interest of the authority, its mission and the public; and

(h) at the time the board member takes his or her oath of office or within 60 days after the effective date of PARA 2009 (i.e. March 1, 2010), if the board member has already taken his or her oath of office, execute an acknowledgment (form to be developed by ABO and AG) in which the board member acknowledges that he or she understands his or her role and fiduciary responsibilities, and acknowledges that he or she understands his or her duty of loyalty and care to the organization and commitment to the authority's mission and public interest.

2. Training[44]

Board members must participate in State-approved training regarding their legal, fiduciary, financial and ethical responsibilities as directors of the authority within one year of appointment to the board. Board members must participate in continuing training as may be required to remain informed of best practices, and regulatory and statutory changes relating to effective oversight of management and financial activities of authorities.

3. Separation of Board and Management

No chair who is also the chief executive officer shall participate in determining the level of compensation or reimbursement, or time and attendance rules, for the position of chief executive officer.

[43] Effective Date: Immediately unless the authority fiscal year begins after January 1, 2006.

[44] See ABO Recommended Governance Practices – New Board Member Orientation for further guidance, available on ABO's website: https://abo.ny.gov/recommended-practices (last visited January 12, 2026)

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4. Extension of Credit

The board is prohibited from extending or maintaining credit, arranging for the extension of credit or renewing an extension of credit, in the form of a personal loan to, or for, any officer, board member or employee of the authority.

5. Establishment of Committees

Audit Committee. The board must establish an audit committee to be comprised of at least three independent members who shall constitute a majority on the committee. If the board has less than three independent members, the board can appoint non-independent members to the committee, provided that the independent members constitute the majority. To the extent practicable, members of the audit committee should be familiar with corporate financial and accounting practices. The audit committee must recommend to the board the hiring of a CPA firm, establish compensation to be paid to the CPA firm and provide direct oversight of the performance of the independent annual audit performed by the CPA firm.

Governance Committee. The board must establish a governance committee to be comprised of at least three independent members who shall constitute a majority on the committee. If the board has less than three independent members, the board can appoint non-independent members to the committee provided that the independent members constitute the majority. The governance committee must keep the board informed of current best governance practices, review corporate governance trends, update the authority's governance principles and advise appointing authorities of the skills and experiences required of potential board members. In addition, PARA requires that the committee examine ethical and conflicts of interest issues; perform board self-evaluations; and recommend by-laws which include rules and procedures for conduct of board business.

Finance Committee. Any authority that issues debt must establish a finance committee. The finance committee must have at least three independent members who shall constitute a majority on the committee. If the board has less than three independent members, the board can appoint non-independent members to the committee provided that the independent members constitute the majority. The responsibility of the committee is to review proposals for the issuance of debt by the authority and its subsidiaries and make recommendations[45].

F. MISSION STATEMENT AND MEASUREMENT REPORT (PAL § 2824-A)

Every authority is expected to annually review its mission statement and measures and publish a measurement report. Each authority must submit its mission statement to the ABO as part of its Annual Report. The ABO maintains these mission statements on its website and the authority must also post and maintain its mission statement and performance report on its website." The report must contain a brief mission statement expressing the purpose and goals of the authority, a description of the stakeholders of the authority and their reasonable expectations from the authority, and a list of measurements by which performance of the authority and the achievement of its goals may be evaluated. The authority must annually reexamine its mission statement and measurements and publish a self-evaluation. A waiver may be obtained from the director of the ABO if determined unnecessary for an individual authority.

G. INDEPENDENCE AND FINANCIAL DISCLOSURE (PAL § 2825)

1. Independence[46]

Except for board members who serve as members by virtue of holding a civil office of the State, the majority of the remaining members who are appointed on or after January 13, 2006, must be independent. An independent member is one who:

(a) is not, and in the past two years has not been, employed by the public authority or an affiliate in an executive capacity;

(b) is not, and in the past two years has not been, employed by an entity that received remuneration valued at more than $15,000 for goods and services provided to the public authority or received any other form of financial assistance valued at more than $15,000 from the public authority;

[45] See ABO Recommended Governance Practices – Model Finance Committee Charter for further guidance, available on ABO's website: https://abo.ny.gov/recommended-practices (last visited January 12, 2026).

[46] Effective for board members appointed on or after January 13, 2006.

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(c) is not a relative of an executive officer or employee in an executive position of the public authority or an affiliate; and

(d) is not, and in the past two years has not been, a lobbyist registered under a State or local law and paid by a client to influence the management decisions, contract awards, rate determinations or any other similar actions of the public authority or an affiliate. The new audit committee would be required to make recommendations to the board concerning the engagement of a certified independent accounting firm, compensation to be paid for same, and to provide direct oversight of the engagement.

2. Financial Disclosure[47]

Board members, officers, and employees must file annual financial disclosure statements with the county board of ethics for the county in which the local public authority has its primary office pursuant to Article 18 pursuant to the Act.

H. DISPOSITION OF PROPERTY[48]

1. Definitions (PAL § 2895)

(a) "Dispose" or "Disposal" means the "transfer of title or any other beneficial interest in personal or real property," and

(b) "Property" means "personal property in excess of $5,000 in value, real property, and any inchoate or other interest in such property, to the extent that such interest may be conveyed to another person for any purpose, excluding an interest securing a loan or other financial obligation of another party."

2. Duties of the Authority (PAL § 2896)

Adopt Guidelines. Adopt by resolution, guidelines which must: (i) detail the authority's policy and instructions regarding the use, awarding, monitoring and reporting of contracts for the disposal of property, and (ii) designate a contracting officer who shall be responsible for the authority's compliance with, and enforcement of, such guidelines. The guidelines must be consistent with the provisions of the PAAA, the authorities enabling legislation, and any other applicable law for the disposal of property, except that the guidelines may be stricter than the aforementioned if the authority determines that additional safeguards are necessary. The guidelines must be annually reviewed and approved by the governing body of the authority.

On or before the 31st of March in each year, the authority must file with the comptroller a copy of the guidelines most recently reviewed and approved by the authority, including the name of the designated contracting officer. The guidelines must be posted on the authority's website and maintained on such site until the procurement guidelines for the following year are posted.

(a) maintain adequate inventory controls and accountability systems for all property under its control.

(b) periodically inventory such property to determine which property shall be disposed.

(c) transfer or dispose of such property as promptly as possible.

(d) Publish, not less frequently than annually, a report listing all real property of the public authority. The report must consist of a list and a full description of all real and personal property disposed of during the reporting period. The report must contain the price received by the authority and the name of the purchaser for all property sold by the authority during the reporting period. The report must be delivered to the comptroller, the director of the budget, the commissioner of general services, and the legislature.

3. Disposal Requirements (PAL § 2897)

(a) The contracting officer must have supervision and direction over the disposition of property.

(b) The custody and control of the property, pending its disposition, and the disposal of such property must be performed by the authority in possession thereof.

(c) A deed, bill of sale, lease or other instrument executed by, or on behalf of, any

[47] Effective Date: Immediately unless the authority fiscal year begins after January 1, 2006.
[48] Effective Date: Immediately unless the authority's fiscal year begins after January 1, 2006.

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public authority purporting to transfer title or any other interest in the property under the provisions of the PAAA shall be conclusive evidence of compliance with the provisions of PAAA, insofar as it concerns title or other interest of any bona fide grantee or transferee who has given valuable consideration for such title or other interest and has not received actual or constructive notice of a lack of such compliance prior to closing.

(d) No disposition of real property, or any interest in real property, shall be made by the authority unless an appraisal of the value of such property has been made by an independent appraiser and included in the record.

(e) The authority must not dispose of property unless it publicly advertises for bids, with exceptions (see below).

(f) The authority must not dispose of property for less than FMV, with exceptions (see below).

4. Procedures for Disposal

(a) An appraisal for real property must be obtained and included in the record of the disposition.

(b) All disposals or contracts for disposal of property must be made after publicly advertising for bids (with exceptions as discussed below).

(c) The advertisement for bids must be made at such time prior to the disposal or contract through such methods and, on such terms and conditions, as shall permit full and free competition consistent with the value and nature of the property.

(d) All bids would have to be publicly disclosed at the time and place stated in the advertisement.

(e) The award of bids shall be made with reasonable promptness by notice to the responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the State. Price and other factors may be considered, and all bids may be rejected when it is in the public interest to do so.

(f) Exceptions to publicly advertising: The disposal and contracts for disposal of property may be negotiated or made by public auction subject to obtaining such competition as is feasible under the circumstances if:

i. the personal property involved has qualities separate from the utilitarian purpose of such property, such as artistic quality, antiquity, historical significance, rarity or other quality of similar effect that would tend to increase its value, or if the personal property is to be sold in such quantity that, if it were disposed of under paragraphs (a) and (b) of this subdivision, would adversely affect the State or local market for such property and the estimated fair market value of such property and other satisfactory terms of disposal can be obtained by negotiation;

ii. the FMV of the property does not exceed $15,000;

iii. bid prices after advertising are not reasonable, either as to all or some part of the property, or have not been independently arrived at in open competition;

iv. the disposal will be to the State or any political subdivision, and the estimated FMV of the property and other satisfactory terms of disposal are obtained by negotiation; or

v. such action is otherwise authorized by law.

(g) Exceptions to publicly advertising and obtaining FMV:

i. transferee is a government or public entity and terms of transfer require ownership and use to remain with the government or public entity; or

ii. purpose of the transfer is within the purpose, mission or statute of the authority; or

iii. written notification to the Governor, the Speaker and the Temporary President. Such notification is subject to denial. Denial by Governor is in the form of a certification. Denial by the legislature is in the form of a

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resolution. Denial must be made within 60 days of receiving the notification during the months January through June. Provided no denial, then authority may effectuate transfer. If the legislature receives the notification in the months July through December, then legislature may take 60 days from January 1 of the following year. However, a local authority may obtain local approval from the chief executive and legislature of the political subdivision in lieu of the notification to the Governor, Speaker and Temporary President provided the local authority's enabling legislation provides for such approval and the property was obtained by the authority from the political subdivision.

(h) If a below FMV transfer is proposed, the following information is required to be provided to the authority's board and the public:

i. description of the asset;

ii. appraisal of the FMV of the asset;

iii. description of purpose of the transfer, the kind and amount of the benefit to the public resulting from the transfer, such as jobs and wages created or preserved;

iv. value received compared to FMV;

v. names of private parties to the transaction and the value received;

vi. names of private parties that have made an offer, the value of offer and purpose for which the asset would have been used;

vii. board must make a written determination that there is no reasonable alternative to the proposed below-market transfer that would achieve the same purpose of such transfer.

(i) Ninety-day notice of a negotiated disposal[49]: An explanatory statement would have to be prepared and transmitted to the comptroller, the director of the budget, the commissioner of general services and the legislature at least 90 days in advance of such disposal in instances of disposal by negotiation where:

i. any personal property has an estimated FMV in excess of $15,000;

ii. any real property that has an estimated FMV in excess of $100,000, except in instances where real property is disposed of by lease or exchange, unless such lease or exchange includes:

(a) any real property disposed of by lease, if the estimated fair annual rent is in excess of $15,000;

(b) any real property or real and related personal property disposed of by exchange, regardless of value, or any property any part of the consideration for which is real property.

(c) no disposition of real property, or any interest in real property, shall be made unless an appraisal of the value of such property has been made by an independent appraiser and included in the record.

I. INVESTMENT GUIDELINES (PAL § 2925)[50]

The PAAA requires all authorities to annually adopt and review comprehensive investment guidelines which detail the authority's operative policy and instructions to officers and staff regarding the investing, monitoring and reporting of funds.

J. DEBT (PAL § 2856)

Every authority not subject to a statutory limit on the debt it may issue, must submit to the ABO a statement of intent to guide the authority's issuance and overall amount of debt. The submission date will be set by the ABO.

[49] A copy of the statement must be preserved in the files of the authority making the disposal.
[50] Effective Date: Immediately unless the authority fiscal year begins after January 1, 2006.

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K. REQUIREMENTS

For purposes of complying with PARA and PAAA, IDAs and LDCs should be aware of the following requirements:

Annual Report. Within 90 days after the end of its fiscal year, the authority must submit to the CEO, CFO, chairperson of the legislative body of the local government or local governments and the ABO, an Annual Report.

Certification of Financial Reports. Every financial report submitted in the annual report must be approved by the board and must be certified in writing by the CEO and the CFO of such authority.

Web site. The authority must post its mission, current activities, most recent annual report, current year budget and its most recent independent audit report on its website.

Budget Report. At least 60 days prior to the commencement of its fiscal year, the authority must submit to the CEO, CFO, chairperson of the legislative body of the local government or local governments, and the ABO, a budget report.

Audit Report. The authority must submit, along with the Annual Report required by PAL § 2800(2), a copy of the annual independent audit report (performed by a certified public accounting firm in accordance with generally-accepted government auditing standards), a management letter, and any other external examination of the books and accounts of the authority, other than examinations made by the State Comptroller, to the CEO, CFO, chairperson of the legislative body of the local government or local governments, and the ABO.

Auditor Qualification. A CPA firm is prohibited from performing any non-audit function contemporaneously with the audit, unless prior approval is given by the audit committee; CPA firm is prohibited from performing the audit if senior management of the authority was employed by the CPA firm within one year prior to the commencement of the audit; the lead audit partner or the audit partner responsible for reviewing the audit cannot have performed audit services for the authority in each of the five previous fiscal years.

Property Disposition. Must obtain an appraisal for the disposition of any interest in real property. Must appoint a contracting officer; dispose of property for at least FMV after publicly advertising with exceptions; must provide 90 days prior notice to the comptroller, the director of the budget, the commissioner of general services and the legislature for negotiated disposals.

Board Members. Majority of board members appointed on or after January 13, 2006, must be independent (not including ex-officio); must receive training within one year of appointment.

Board Committees. Must establish audit, governance and finance committees comprised of at least three independent members.

Financial Disclosure. Board members, officers and employees must file annual financial disclosure statements with the county board of ethics for the county in which the local public authority has its primary office pursuant to Article 18 pursuant to the Act.

Codes, Policies and Guidelines. The board must:

(1) Establish policies regarding the payment of salary, compensation and reimbursements to, and establish rules for, the time and attendance of the CEO and senior management.

(2) Adopt a code of ethics applicable to each officer, director and employee that, at a minimum, includes the standards established in § 74 of the POL.

(3) Establish written policies and procedures on personnel, including policies protecting employees from retaliation for disclosing information concerning acts of wrongdoing, misconduct, malfeasance or other inappropriate behavior by an employee or board member of the authority; investments; travel; the acquisition of real property; the disposition of real and personal ; and the procurement of goods and services.

(4) Adopt a defense and indemnification policy and disclose such plan to all prospective board members.

(5) Adopt by resolution, guidelines which must (a) detail the authority's policy and instructions regarding the use, awarding, monitoring and reporting of contracts for the disposal of property, and (b) designate a contracting officer who shall be responsible for the authority's compliance with, and enforcement of, such guidelines.

(6) Annually adopt and review comprehensive investment guidelines which detail the authority's operative policy and instructions to officers and staff

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regarding the investing, monitoring and reporting of funds of the authority.

(7) Adopt a Mission Statement and Measurement Report. Must re-examine annually and publish a self-evaluation.

L. COMPLIANCE REVIEW

The ABO is authorized by the PAAA to conduct reviews and analyses of the operations, practices and reports of public authorities to assess compliance with the provisions of the PAAA and other applicable laws.

The ABO has commenced governance reviews of public authorities and has specifically reviewed the following:

(1) Board duties and committee involvement;

(2) Board member participation in State-approved training;

(3) Policies and procedures required under the PAAA, PARA, PAL, GML and POL;

(4) Policies and procedures indicative of good governance practices;

(5) Cash and investments, and asset management practices;

(6) Independent financial audits and other reporting;

(7) Adherence with reporting requirements; and

(8) Project review, approval and monitoring processes

In addition to reviewing records and documentation, the ABO will attend board meetings and interview management.

The ABO, in its compliance reviews, has identified where authorities have failed to be in compliance with applicable statutory provision and/or where authorities followed their own procedures. The ABO has also provided specific comments recommending certain procedures or activities that the ABO believes will improve the overall good governance of authorities.

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PROCUREMENT LOBBYING LAW

BY ROBERT J. RYAN

A. SUMMARY

Chapter 1 of the Laws of 2005, as amended by Chapter 596 of the Laws of 2005, generally referred to as the "Procurement Lobbying Law" ("PLL"), significantly changes procurement contracting with governmental entities. The PLL affects: (i) activities by the lobbying community seeking procurement contracts by amending the Legislative Law, and (ii) the activities of governmental entities seeking to enter into procurement contracts by amending the State Finance Law ("SFL"). As such, PLL provides that contacts made to governmental entities regarding procurements are covered under the Lobby Law and limits communications on governmental procurements to contacts between contractors and procurement professionals in contracting entities.

Additionally, PLL established an Advisory Council on Procurement Lobbying ("Advisory Council"). Among other things, the Advisory Council is charged with developing model guidelines and forms for use by governmental entities regarding the restrictions on contacts during the procurement process. A website link to the Advisory Council information can be found on the NYS Office of General Services ("OGS") website at www.OGS.NY.GOV.

The PLL restricts contacts by an offerer which are intended to influence the governmental procurement, at the point in time when the governmental entity issues its first written document soliciting a response from offerers that is intended to result in a procurement contract. Such contacts must only be made to specifically designated persons at the governmental entity.

The PLL requires the governmental entity to collect and record certain information pertaining to those who contact the governmental entity to influence a governmental procurement. Such information must be made part of the procurement record. In addition, PLL requires governmental entities to notify offerers of the permissible contacts provisions in its solicitation materials and to obtain prior non-responsibility determinations from the offerer.

Furthermore, PLL requires governmental entities to make a determination of non-responsibility if it is found that the offerer knowingly and willfully made an impermissible contact, or failed to timely disclose accurate and complete information, or otherwise cooperate in providing the required information. Such a determination of non-responsibility precludes the governmental entity from awarding a procurement contract to such offerer. In addition, offerers that are determined to be non-responsible for a second time within a four-year period are rendered ineligible to submit a proposal on, or be awarded any, procurement contract for a period of four years from the date of the second determination.

Lastly, the governmental entity must report all such findings of non-responsibility to the OGS, which will maintain a publicly available list.

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B. APPLICABILITY (SFL § 139-J(1)(A))

The following "governmental entities" are required to comply with the new SFL provisions when conducting procurements:

(1) State agencies (includes boards, commissions, divisions, offices, councils and committees);

(2) NYS Legislature;

(3) Unified Court System;

(4) IDAs in jurisdictions with a population of 50,000 or more;

(5) Local public benefit corporations; and

(6) Public authorities and public benefit corporations and any subsidiary or affiliate thereof.

Note: In general, the provisions of PLL apply to procurements of governmental entities, however, in regard to real property, disposals are included.

C. KEY DEFINITIONS

Contacts. Any oral, written or electronic communication with a governmental entity under circumstances wherein a reasonable person would infer that communication was intended to influence a governmental procurement.

Governmental Procurement. (i) the preparation or terms of the specifications, bids, requests for proposals ("RFPs") or evaluation criteria for a procurement contract; (ii) solicitation for a procurement contract; (iii) evaluation of the procurement contract; (iv) award or denial of a procurement contract; or (v) approval or denial of an assignment, amendment (other than amendments that were authorized under the terms of the procurement contract approved by the comptroller), renewal or extension of a procurement contract, or any other material change, that results in a financial benefit to the offerer.

Procurement Contract. Any contract or other agreement for an article of procurement involving an estimated annualized expenditure in excess of $15,000. Grants and contracts providing for payments to not-for-profit organizations under a program appropriation pursuant to Article 11-B of SFL are exempted from the definition of "procurement contract." In addition, intergovernmental agreements, railroad and utility force accounts, utility relocation agreements or orders and eminent domain transactions are also exempted.

Article of Procurement. A commodity, service, technology, public work, construction, revenue contract, the purchase, sale or lease of real property or an acquisition or granting of other interest in real property that is the subject of a governmental procurement.

Offerer. The individual or entity, or any employee, agent, consultant or person acting on the behalf of such individual or entity, that contacts a governmental entity about a governmental procurement during the restricted period of such governmental procurement.

Restricted Period. The period of time commencing with the earliest written notice, advertisement or solicitation of a RFP, invitation for bids, or solicitation of proposals, or any other method for soliciting a response from offerers, intending to result in a procurement contract with a governmental entity with the final contract award and approval by the governmental entity and, where applicable, the State Comptroller.

D. RESTRICTIONS ON CONTACTS DURING THE PROCUREMENT PROCESS (SFL § 139-J)

1. Governmental Entity Requirements (SFL § 139-j(2), (5-11))

Each government entity:

(a) shall designate a person or persons who may be contacted by offerers related to a procurement.

(b) shall make any determinations on any procurement consistent with that authority's procurement guidelines and free from any conduct that would be prohibited by POL 73(5) and 74 or any other applicable code of ethics.

(c) may consult model guidelines that may be established by the Advisory Council on procurement lobbying.

(d) must incorporate a summary of the policy and prohibitions regarding permissible contacts during a procurement, as well as copies of all rules, regulations and guidelines concerning permissible contacts, into the authority's solicitation of proposals or bid documents or specifications for all procurements.

(e) must seek written affirmation from all offerers as to that offerer's understanding of, and agreement to, comply with the authority's procedures relating to permissible contacts.

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(f) must make a final determination of responsibility of the proposed awardee in accordance with the authority's procurement guidelines.

(g) must, if any member of the procuring governmental entity becomes aware that an offerer violated the permissible contacts provision, immediately notify the ethics officer, the New York State Inspector General (the "IG"), if any, or other official of the governmental entity responsible for reviewing and investigating such matters.

(h) must, if any member of another governmental entity becomes aware that an offerer violated the permissible contacts provision, immediately notify the ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating such matters, and such person must immediately notify the equivalent person at the procuring governmental entity.

(i) must establish a process for review by the ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating any allegations of violations of the permissible contacts provisions.

(j) must establish a process for the imposition of sanctions if such violations have been found to exist.

(k) must, upon notification of an alleged violation, the governmental entity's ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating such matters, immediately investigate such allegation and, if sufficient cause exists to believe that the allegation is true, must give the offerer reasonable notice that an investigation is ongoing and must give said offerer an opportunity to be heard in response to the allegation.

(l) may make a finding that an offerer has knowingly and willfully violated the permissible contact provisions, which must result in a determination of non-responsibility for such offerer and such offerer must not be awarded the procurement contract unless the governmental entity finds that the award is necessary to protect public property or public health or safety, and that the offerer is the only source capable of supplying the required article of procurement within the necessary time frame. The governmental entity must include, in the procurement record, a statement describing the basis of the finding. Any subsequent finding of non-responsibility due to a violation of the permissible contacts provisions within four years of a determination must result in the offerer being rendered ineligible to submit a proposal on, or be awarded any, procurement contract for a period of four years from the date of the second final determination.

(m) must require offerers to disclose findings of non-responsibility due to violations of the permissible contacts provisions or the intentional provision of false or inaccurate information to a governmental entity within the previous four years in the entity's solicitations for proposals. (See also SFL § 139-k(2).)

(n) must consider, in its determination of responsibility, any failure of an offerer to timely disclose accurate and complete information or otherwise cooperate with the governmental entity. (See also SFL § 139-k(3).)

(o) must not award a contract to an offerer who fails to timely disclose accurate and complete information or otherwise cooperate with the governmental entity, unless the governmental entity finds that the award is necessary to protect public property or public health or safety, and that the offerer is the only source capable of supplying the required article of procurement within the necessary time frame. The governmental entity must include, in the procurement record, a statement describing the basis of the finding. (See also SFL § 139-k(3).)

(p) must, upon a finding of non-responsibility or debarment, the governmental entity must notify the OGS, which shall keep a list and make it publicly available.

If an employee of the governmental entity is found to have knowingly and willfully violated the governmental entity's requirements in relation to

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the permissible contacts provisions, then the ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating such matters, must report the violation to the governmental entity's chairperson or highest official.

A procurement contract award must contain a certification by the offerer that all information provided to the governmental entity is complete, true and accurate and such procurement contract must contain a provision authorizing the governmental entity to terminate the contract in the event such certification is found to be intentionally false or intentionally incomplete. The governmental entity shall include, in the procurement record, a statement describing the basis for any action taken pursuant to such termination provision. (See SFL § 139-k(5).)

2. Offerer Responsibilities (SFL § 139-j(3) & (4))

The offerer may contact only the person or persons designated by the governmental entity with respect to a governmental procurement. Violations of this provision also include any contacts during the restricted period of a governmental procurement between the offerer and any member, officer or employee of any governmental entity other than the entity conducting the governmental procurement. However, this does not prohibit an offerer from communicating with a member of the State Legislature or legislative staff about a governmental procurement being conducted by a governmental entity other than the State Legislature or a member of the State Legislature. In addition, this does not prohibit a member of the State Legislature or legislative staff member from contacting a governmental entity other than the State Legislature about a procurement being conducted by that entity, as long as the legislative member or staff person is acting in their official capacity.[51]

The offerer must not attempt to influence the governmental procurement in a manner that would result in a violation or an attempted violation of POL 73(5) and 74 or any other applicable code of ethics.

E. DISCLOSURE BY GOVERNMENTAL ENTITIES (SFL § 139-K)

Upon any contact in the restricted period, the governmental entity must obtain the name, address, telephone number, place of principal employment and occupation of the person or organization making the contact, and inquire and record whether the person or organization making such contact was the offerer or was retained, employed or designated by or on behalf of the offerer, to appear before or contact the governmental entity about the governmental procurement. All recorded contacts shall be included in the procurement record for the procurement contract.

Any communications received by a governmental entity from members of the State Legislature, or legislative staffers, when acting in their

[51] Exemptions from the restrictive contacts provision in this section include: (1) the submission of written proposals in response to RFPs, invitation for bids or any other method of soliciting a response from offerers intending to result in a procurement contract; (2) the submission of written questions to a designated contact set forth in a RFP, or invitation for bids, or any other method of soliciting a response from offerers intending to result in a procurement contract, when all written questions and responses are to be disseminated to all offerers who have expressed an interest in the RFPs, or invitation for bids, or any other method of soliciting a response from offerers intending to result in a procurement contract; (3) participation in a conference provided for in a RFP, invitation for bids, or any other method of soliciting a response from offerers intending to result in a procuring contract; (4) complaints by an offerer regarding the failure of the person or persons designated by the procuring governmental entity pursuant to this section to respond in a timely manner to authorized offerer contacts make in writing to the office of general counsel of the procuring governmental entity, provided, that any such written complaints shall become a part of the procurement record; (5) Offerers who have been tentatively awarded a contract and are engaged in communications with a governmental entity solely for the purpose of negotiating the terms of the procurement contract after being notified of tentative award; (6) contacts between designated governmental entity staff of contacts, the procuring governmental entity and an offerer to request the review of a procurement contract award; and (7) (a) contacts by offerers in protests, appeals or other review proceedings (including the apparent successful bidder or proposer and his or her representatives) before the governmental entity conducting the procurement seeking a final administrative determination, or in a subsequent judicial proceeding; or complaints of alleged improper conduct in a governmental procurement to the attorney general, inspector general, district attorney, or court of competent jurisdiction; or (b) complaints of alleged improper conduct in a governmental procurement to the attorney general, inspector general, district attorney, or court of competent jurisdiction; or (c) written protests, appeals or complaints to the State Comptroller's office during the process of contract approval, where the State Comptroller's approval is required by law, and where such communications and any responses thereto are made in writing and shall be entered in the procurement record pursuant to section one hundred sixty-three of the SFL; or (d) complaints of alleged improper conduct in a governmental procurement conducted by a municipal agency or local legislative body to the State Comptroller's office.

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official capacity, shall not be considered to be a "contact" and shall not be recorded by a governmental entity.

F. REQUIREMENTS

Per the PLL, local public authorities, including IDAs, need to comply with the following requirements:[52]

(a) Designate, with regard to each governmental procurement, a person or persons who may be contacted by offerers. (See SFL § 139-j(2)(a).)

(b) Upon any contact in the Restricted Period, the governmental entity must obtain the name, address, telephone number, place of principal employment and occupation of the person or organization making the contact, and inquire and record whether the person or organization making such contact was the offerer or was retained, employed or designated by or on behalf of the offerer, to appear before or contact the governmental entity about the governmental procurement. All recorded contacts shall be included in the procurement record for the procurement contract. (See SFL § 139-k(4).)

(c) Incorporate a summary of the Governmental Entity's policy and prohibitions regarding permissible contacts during a governmental procurement in its solicitation materials. (See SFL § 139 j(6).)

(d) Must seek written affirmation from all offerers as to said offerer's understanding of, and agreement to comply with, the authority's procedures relating to permissible contacts. (See SFL § 139-j(6)(b).)

(e) Must require offerers to disclose findings of non-responsibility due to violations of the permissible contacts provisions or the intentional provision of false or inaccurate information to a governmental entity within the previous four years in the entity's solicitations for proposals. (See SFL §139-k(2).)

(f) A procurement contract award must contain a certification by the offerer that all information provided to the governmental entity is complete, true and accurate and such procurement contract must contain a provision authorizing the governmental entity to terminate the contract in the event such certification is found to be intentionally false or intentionally incomplete. The governmental entity shall include in the procurement record a statement describing the basis for any action taken pursuant to such termination provision. (See SFL § 139-k(5).)

(g) Any member of the procuring governmental entity that becomes aware that an offerer violated the permissible contacts provision must immediately notify the ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating such matters. (See SFL § 139-j(8).)

(h) Must establish a process for review by the ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating any allegations of violations of the permissible contacts provisions. (See SFL § 139-j(9).)

(i) Upon notification of an alleged violation, the governmental entity's ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating such matters, must immediately investigate such allegation and, if sufficient cause exists to believe that the allegation is true, must give the offerer reasonable notice that an investigation is ongoing and must give said offerer an opportunity to be heard in response to the allegation. (See SFL § 139-j(10)(a).)

A finding that an offerer has knowingly and willfully violated the permissible contact provisions, or the disclosure provisions, must result in a determination of non-responsibility for such offerer, and such offerer must not be awarded the procurement contract unless the governmental entity finds that the award is necessary to protect public property or public health or safety, and that the offerer is the only source capable of supplying the required article of procurement within the necessary time frame. The governmental entity

[52] Note: An offerer must only contact the person or persons designated as the contact person(s) by the governmental entity during the RestrictPeriod of a governmental procurement.

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must include, in the procurement record, a statement describing the basis of the finding. Any subsequent finding of non-responsibility due to a violation of the permissible contacts or disclosure provisions within four years of a determination must result in the offerer being rendered ineligible to submit a proposal on, or be awarded any, procurement contract for a period of four years from the date of the second determination (debarment). (See SFL § 139-j (10)(b) & 139-k(3).)

Upon a finding of non-responsibility or debarment, the governmental entity must notify OGS, which shall keep a list and make it publicly available. (See SFL § 139-j (10)(b).)

If an employee of the governmental entity is found to have knowingly and willfully violated the governmental entity's requirements in relation to the permissible contacts provisions, then the ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating such matters must report such instances to the governmental entity's chairperson or highest official. (See SFL § 139-j(10)(c).)

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LOBBYING COMPLIANCE OVERVIEW

BY ROBERT J. RYAN

A. LOBBYING COMPLIANCE

WHAT IS LOBBYING?

Lobbying is any attempt to influence certain specified government actions.

DO I NEED TO REGISTER AS A LOBBYIST?

The answer depends on whether your company or organization is a registered lobbyist or whether you engage in lobbying activities above a certain threshold. Note, the definition of "lobbying" and thresholds differ at the Federal, State and municipal (e.g., New York City) levels.

B. FEDERAL LAW

Under Federal lobbying law, "lobbying" includes any communication or other **attempt to influence** a "covered public official" or employee regarding (1) Federal legislation; (2) a Federal rule, regulation executive order, or any other program, policy or proposition of the U.S. government; (3) a Federal program or policy (including contracts, grants, loans, permits or leases); and (4) Federal nominations or confirmations.[53] This includes influencing the formulation, modification or adoption of Federal legislation.[54] In other words, "lobbying" means making "lobbying contact," including any effort to support that contact, including preparation, time and research.

"Lobbying contact" means any oral, written, or electronic communication to a covered official that is made on behalf of a client with regard to the enumerated subjects listed above.[55]

"Covered public officials" include all members of Congress and their staffs, as well the following executive branch officials: The President; The Vice President; Officers or employees of the Executive Office of the President, including all employees of the Office of Management and Budget and the Office of Science and Technology Policy; Any official serving at levels I-V of the Executive Schedule; Any member of the uniformed services whose pay grade is at or above 0-7; Schedule C employees (generally employees who are responsible for determining policies and are appointed by presidential appointment positions).[56]

Thresholds

An individual is a "lobbyist" with respect to a particular client if he or she makes more than one lobbying contact and his or her "lobbying activities"

[53] *See* 2 U.S.C. § 1602(7)-(8).
[54] See id.
[55] *See* 2 U.S.C. § 1602(8)(A).
[56] *See* 2 U.S.C. § 1602(3)-(4).

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constitute at least 20% of the individual's time in services for that client over any three-month period.[57] More commonly referred to as the "2x/20% Test," this means that you must register as a lobbyist if you have more than one lobbying contact, and lobbying activities exceed 20% of your time over any consecutive three-month period. Note, however, that even if you meet this test, you are exempt from having to register if your total compensation and/or expenses related to lobbying do not exceed $14,000 for a three-month period.

When calculating whether 20% of time is spent on lobbying activities, the following activities would all need to be included in that calculation: lobbying contacts and any efforts in support of lobbying contact; planning and preparation; research and any other background work that is intended to be used for lobbying contacts. State and local lobbying efforts fall outside the definition of lobbying activities to be considered when using the "2x/20% Test," but may be subject to disclosure at the State or local level.

Exceptions

There are currently 19 classes of communications that are not considered "lobbying activities," and thus would not be included in any "2x/20% Test" calculation. However, these may qualify as "lobbying activities" if any of these communications are made in support of other communications that constitute reportable lobbying contacts.

Public Activities

(1) testimony given before a committee or subcommittee of Congress (that is included in the public record);

(2) speeches, articles or publications of other material that are made available to the public or distributed through radio, television, cable television or other methods of mass communication;

(3) communications made by a representative of a media organization if the purpose of the communication is gathering and disseminating news and information to the public;

Requests for Information

(1) information provided in writing in response to a request by a covered executive or legislative branch official (the request may be oral or written);

(2) information required by subpoena or civil investigative demand, or otherwise compelled by statute, regulation or other action of Congress or an agency (including information compelled by a contract, grant, loan, permit or license);

Regulatory Activities

(1) communications in response to a notice in the Federal Register or similar publications and directed toward the agency official listed in the notice;

(2) communications that are made on the record in a public proceeding;

(3) written comments filed in the course of a public proceeding;

(4) petitions for agency action made in writing and made part of the public record;

(5) communications made to an agency official regarding a civil, criminal or administrative inquiry, investigation, filing or proceeding;

Governmental and Legally Protected Communications

(1) made by a public official acting in his or her official capacity;

(2) made in the course of participation in an advisory committee subject to the Federal Advisory Committee Act;

(3) between officials of a "self-regulatory organization" registered with, or established by, the Securities and Exchange Commission (SEC), or designated by, or registered with, the Commodity Futures Trading Commission (CFTC) and officials of the SEC and CFTC;

(4) not possible to report without disclosing information, the unauthorized disclosure of which is prohibited by law;

(5) disclosures made under the Whistleblower Protection Act;

Miscellaneous Communications

(1) related to administrative requests, such as requests for a meeting or about the status of a matter (as long as

[57] See 2 U.S.C. § 1602(10).

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the request does not include an attempt to influence a covered official);

(2) made on behalf of a foreign government or a foreign political party and disclosed under the Foreign Agents Registration Act;

(3) made on behalf of an individual and related to that individual's particular personal matters, but only if made to that individual's elected Members of Congress or employees under the direct supervision of those Members;

(4) made by certain churches, integrated auxiliaries, conventions or associations of churches, or religious orders, exempt from filing Federal income tax returns.

For example, under 2 U.S.C. § 1602(8)(B)(v), the term "lobbying contact" does not include "a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence a covered Executive Branch official or a covered Legislative Branch official." However, a status request would constitute "lobbying activity" if it were in support of a subsequent lobbying contact, provided the "2x/20% Test" is met.

C. NEW YORK STATE LAW

Under NYS law, "lobbying" also includes any **attempt to influence:** (1) legislation or resolutions **before the NYS Legislature**; (2) gubernatorial executive orders; (3) any rule or regulation of a State agency; (4) State or municipal ratemaking proceedings; (5) governmental procurements; (6) local laws, ordinance, resolutions or regulations; (7) municipal executive orders; (8) tribal-state agreements, compacts or memoranda of understanding; and articles of procurement. [58]

Under the Lobbying Act, lobbyists are required to file registration statements with the New York State Commission on Ethics and Lobbying in Government ("COELIG"). [59] Organizations that are registered as lobbyists are also required to report expenses or compensation related to lobbying activities and are subject to prohibitions on giving gifts to public officials or employees in connection with some desired government action.

Lobbyist Disbursement of Public Monies Report

If a registered lobbyist anticipates spending $5,000 per year or more to influence a solicitation, award or administration of a grant, loan or agreement involving the disbursement of public monies in excess of $15,000, the lobbyist must file a Lobbyist Disbursement of Public Monies. This requirement is separate and apart from typical client and lobbyist reports. This report only needs to be filed in periods when the lobbying has occurred.

Threshold

NYS's threshold is significantly lower than the Federal government's threshold. Unlike at the Federal level, there is no test based on your number of contacts or percentage of time devoted to lobbying. For NYS, you must register if the organization as a whole expends more than $5,000 related to "lobbying" activities (which includes internal employee compensation and expenses).

Exceptions

The following are enumerated exceptions under the Comprehensive Lobbying Regulations and do not qualify as reportable lobbying activities:

(1) Non-lobbying legal services;
(2) News gathering and publication;
(3) Contacts with the media;
(4) Local lobbying by religious organizations;
(5) Licenses and permitting;
(6) Participation at certain public proceedings;
(7) Adjudicatory Proceedings;
(8) Responses to requests for information/comments

D. LOCAL LAWS

New York City, as well as Nassau and Suffolk counties, all have unique lobbying regulations. It is also important to be mindful that these three jurisdictions have a much lower threshold than the State lobbying law; compensation need only exceed $1,000 before registration is required. Further, New York City's law is more expansive than NYS's Lobbying Law. NYC also includes any attempt to influence determinations related to real property (e.g., zoning and development), including actions by the City Planning Commission, and local Boroughs or Community Boards.

[58] Legislative Law § 1-c (c).
[59] Legislative Law § 1-e (a) (1).

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STATE AGENCIES, INCENTIVES AND LAWS

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EMPIRE STATE DEVELOPMENT ("ESD")

BY SHAWN M. GRIFFIN, ROBERT G. MURRAY, ROBERT J. RYAN, AND JULIE A. MARSHALL

A. FINANCIAL ASSISTANCE

Empire State Development ("ESD") is the trade name under which New York State offers benefits that have been statutorily authorized under the Office of Economic Development, Job Development and Urban Development Corporation (d/b/a Empire State Development Corporation). Through ESD, the State can provide direct loans, capital grants or interest rate subsidy grants that result in low-cost financing for the acquisition, construction, renovation or improvement of real estate, including both land and buildings, as well as the acquisition of machinery, equipment and related soft costs. Direct loans are provided at below-market rates to provide a lower overall blended rate with conventional sources. Interest rate subsidy grants that reduce the costs of borrowing from a conventional lender are also available.

Eligible recipients of these loans and grants include industrial companies such as manufacturers, service providers, assemblers, distributors and local development entities on their behalf, as well as headquarter facilities for a broader spectrum of businesses.

Along with direct loans and interest rate subsidy grants, the State will often work with a municipality or county wherein the project is located to access local incentives that can coordinate with State resources and significantly lower project costs. For example, a project will often be partially or wholly financed with IDA bonds, which may also be a vehicle for reducing the company's real property tax liability. In such a case, an ESD interest subsidy grant could be used to lower the costs of the bonds, or a direct loan could be provided in conjunction with bonds.

In order to apply for State resources, an entity must complete the Consolidated Funding Application, discussed below.

B. CONSOLIDATED FUNDING APPLICATION

The Consolidated Funding Application (CFA) utilizes a single-entry point for accessing up to $1 billion in economic development funding, so applicants do not have to slowly steer through several agencies and applications. Through the CFA, applicants for economic development projects will access multiple State funding sources through one application.

Funding is available for the following projects: Affordable Housing; Community and Waterfront Revitalization; Direct Assistance to Businesses; Energy and Environmental Improvements; Low-Cost Financing; Municipal/Public Infrastructure; Parks, Historic Preservation and Heritage Areas; Sustainability Planning Assistance; Transportation Infrastructure; and Workforce Development. Seven State agencies and authorities have made their resources available through the CFA process: Empire State Development; NYS Canal Corporation; NYS Energy Research and Development Authority; Homes and Community Renewal; Office of Parks, Recreation and Historic Preservation; Department of State; and New York Power Authority.

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A submitted CFA is sent electronically to the Regional Council(s) for the geographic area(s) in which the proposed project will take place. Each Regional Council will review and rank applications based on a set of regional endorsement standards. These standards are developed by each region and are available on each Regional Council's website.

Additionally, applications will undergo review by State agencies and authorities administering the grant programs. After completing the review, the State agency(ies) or authority(ies) will notify the Regional Councils as to whether or not projects are eligible for funding.

Awards are based on the combined score of the State agency technical review and the Regional Council endorsement score. Further, each agency will have an approval and disbursement process, which may require applicants to sign contracts or letters of commitment, and submit supporting documents such as verifications of eligibility, tax status and municipal resolutions.

The CFA is available at http://regionalcouncils.ny.gov.

C. TRAINING ASSISTANCE

New York State can provide training assistance in the form of grants and other financial assistance to partially defray the costs of companies that seek to upgrade the skills of current workers or train new employees. Grant funds are available from ESD's Economic Development Fund. In many cases, State staff can also access Federal dollars to augment these sources.

Funds from these sources can be used for classroom or, in certain circumstances, on-the-job training for new hires, including the costs of materials and supplies used directly in training and the cost of hiring outside instructors to train employees. Training can be provided both for specific job skills as well as high-performance work organization techniques and advanced technologies and equipment. State staff can provide references to local networks of training providers in the area where the project is located and will help assemble the most comprehensive and appropriate type of training assistance package in each case.

D. INFRASTRUCTURE LOANS AND GRANTS

Through a variety of sources, the State can provide assistance for any necessary construction, modification or improvements needed in the infrastructure serving an eligible company. Infrastructure improvements include, but are not limited to, water and sewer lines, access roads, docks, wharfs, power lines and rail enhancements that are outside of the walls of any existing or proposed building at the project site.

Note: These areas of assistance are described in summary form for information only. Any specific offer of assistance will be made after discussions with ESD officials and agreement with a company on its project parameters.

Assistance is generally provided in the form of a combination of loans and grants and is available through several programs. One is the State Department of Transportation's Industrial Access Program. Others are discussed in this section.

E. FAST NY SHOVEL-READY GRANT PROGRAM

Since December 2022, ESD has provided over $325 million in grants for the preparation and development of commercial sites across the State to promote "shovel-readiness" to attract large employers, including high-tech manufacturing and interstate distribution and logistics businesses. The FY2026 Executive Budget allocated $100 million in new capital funding for the Focused Attraction of Shovel-Ready Tracts New York ("FAST NY").

ESD accepts Letters of Intent ("LOI"). To apply, the link to the LOI form can be found on the ESD website. The LOI form requires each applicant to provide a brief description (not to exceed 200 words) of the project, including how the project or site meets the FAST NY program goals. The project description should include the size of the project or site (in acres) and an explanation of how the applicant would use the grants from the program, and how the applicant's end goal for the project or site would impact the local and state economies. The project description should also include the high-level plan to market the site for an intended industry.

The FAST NY program will enable municipalities and local economic development agencies to prepare proposed and existing industrial parks and commercial development areas for competitive selection by site selectors looking to place significant industry and employers.

There are three tracks of awards available under the FAST NY program, including:

1. **Track A** – the Shovel-Ready Certification, which is a no-cost designation by ESD for site-marketing purposes that establishes

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that the applicant has worked proactively with the State to address all major permitting issues prior to a business expressing interest in the location;

2. **Track B** – Pre-Development Grants, which are working capital grants of up to $500,000 per site that will be awarded to fund the cost of necessary pre-development site planning and reviews for future shovel-ready sites; and
3. **Track C** – Infrastructure Improvements, which are capital grants awarded to improve the shovel-readiness of existing sites by funding infrastructure improvements such as water, sewer, transportation, electricity and gas.

Eligible applicants for the FAST NY program include (i) municipalities, (ii) municipally designated non-profit economic development organizations, (iii) municipally designated local development corporations and (iv) industrial development agencies. To be eligible for FAST NY grant consideration, an applicant's site must be at least 40 acres in size; however, exceptions may be made for smaller sites that provide certain public benefits, including factors such as proximity to transportation terminals and the possibility for brownfield redevelopment. A FAST NY program applicant must have either (i) control or ownership of the site, or (ii) written consent from the parties who own and control the site as a pre-requisite to submit an application for FAST NY funding.

After an applicant has submitted an LOI through the ESD portal, ESD will send an email to the applicant confirming receipt of the LOI within seven calendar days. ESD will determine an applicant's eligibility to submit the full application within 30 calendar days. ESD will not accept a full application from an applicant until the applicant has received an approved LOI from ESD. Awards will be allocated on a rolling basis until FAST NY funding is exhausted. Projects will be initially reviewed for eligibility, may be subject to a site visit, and will ultimately be selected for advancement or denial based on an ESD internal project review committee.

F. INDUSTRIAL EFFECTIVENESS PROGRAM ("IEP")

The Industrial Effectiveness Program ("IEP") encourages State manufacturing firms to undertake productivity and other operational improvements to remain competitive and profitable. Grants are available to partially underwrite the costs of private sector consultants to conduct a variety of productivity assessments to diagnose competitive problems, identify opportunities for improvement and develop strategies for remedial action. The regional staff of ESD will work with each company to access IEP dollars. Funds are available for both preliminary and full productivity assessments.

G. STATE AND LOCAL TAX CREDITS

New York offers some of the most generous credits for a new capital investment of any state in the country.

A credit against the corporation franchise tax on business corporations is available for up to 7% if eligible new investments in buildings and/or depreciable tangible personal property is used primarily in production by manufacturing, processing, assembling and certain other types of activities. A new business may elect to receive, as a refund, any unused part of the tax credit earned. All businesses may carry forward any unused portions of the credit for up to 15 years.

An additional credit, an Employment Incentive Credit, of 1.5% to 2.5% for the same new capital investment (production facilities and equipment only) is deductible by corporations from the tax payable in each of the two years succeeding the year of the original investment, provided the company meets an employment standard that requires the company's average number of employees in the State (excluding general executive officers) in each of those taxable years to be at least 101% of the comparable average in the year immediately preceding the year of investment. The 1.5% credit applies if employment is at least 101% but less than 102% of the employment base year. A 2% credit applies if employment is at least 102% but less than 103% of the employment base year, and a 2.5% credit applies to employment of 103% or greater than the comparable average in the employment base year.

A corporate taxpayer which was not subject to tax and does not have a taxable year immediately preceding the taxable year in which the investment is made, may determine its eligibility by using the year the investment is made as the base period for calculating the employment change in each of the three succeeding years. Any excess of this credit may be carried forward for up to 15 years.

There are other credits available for research and development facilities (9% Corporate Tax Credit) and investments in air pollution or industrial waste facilities. Additional credits are available in connection with the expansion of emerging technology businesses, including a $1,000 per

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employee job creation credit and a capital credit for qualified investments. In addition, it is expected that local real property taxes may be reduced significantly based on a payment-in-lieu-of-taxes agreement ("PILOT Agreement"), which may use the IDA bond financing mechanism mentioned in the Financial Assistance section above, or simply involve the assistance of the IDA.

State staff will work with the company and its financial advisors to detail the total tax savings based on any project's specific investment plans.

H. SMALL BUSINESS TECHNOLOGY INVESTMENT FUND ("SBTIF")

The Small Business Technology Investment Fund ("SBTIF") provides start-up, high-tech companies throughout the State with a source of venture capital to promote new job creation and economic growth. The SBTIF makes early-stage equity investments in companies that have developed innovative technology products or services and that display significant competitive advantages. It also offers technical and managerial services to growing technology-based business ventures.

I. SEMICONDUCTOR MANUFACTURING INITIATIVE-NEW YORK ("SEMI-NY")

The Semiconductor Manufacturing Initiative-New York ("SEMI-NY") is a comprehensive effort to encourage semiconductor manufacturing in New York State. The State has facilitated the pre-permitting of industrial sites across the State specifically for chip fabrication. Each site is a minimum of 200 acres and can handle the demanding infrastructure requirements of a chip fabrication site. In addition, each site provides access to a skilled workforce, superior highway access, and incentives to help offset both the upfront and ongoing costs of operating these capital-intensive facilities.

J. CENTERS OF EXCELLENCE ("CENTERS")

The Centers of Excellence ("Centers") support high technology ventures through a collaborative approach among the State, academia, private venture capital companies and other private and public sector parties. Established to encourage rapid commercialization of scientific breakthroughs, the Centers specialize in nanoelectronics, bioinformatics, photonics, environmental systems, wireless applications and information technology. Examples include the Center of Excellence in Bioinformatics in Buffalo, Infotonics in Rochester, Nanoelectronics in Albany, Information Technology on Long Island and Environmental Systems in Syracuse.

K. INTERNATIONAL INVESTMENT

ESD comprises a network of offices around the world. ESD's international trade specialists help businesses relocate to, or establish a presence in, the State, expand existing operations and compete more effectively and profitably in domestic and international markets. ESD's technical and financial assistance services help businesses grow and prosper by furnishing site selection and logistical assistance; demographic, wage, tax and utility cost data; quality of life facts; and networking with local government officials and private businesses.

L. RESTORE NEW YORK COMMUNITIES INITIATIVE

The Restore New York Communities Initiative was established in 2006 to encourage economic development and restore economically distressed areas by providing municipalities with financial assistance for ongoing revitalization and community housing improvements. A $300 million appropriation was contained in the 2024-25 New York State budget with $60 million awarded in Round 8 (February 2024) and $50 million awarded in Round 9 (September 2024).

Any New York city, town or village is able to apply for funding. Eligible projects include demolition or deconstruction of residential properties, demolition or deconstruction of commercial properties, rehabilitation or reconstruction of residential properties and rehabilitation or reconstruction of commercial properties. Typically, 10% or more in local matching funds (cash, in-kind or combination) has been required. The maximum grant award per property/project varies by type of project.

As all currently appropriated funds were awarded during the first three rounds, a new State budget appropriation would be required for any subsequent funding rounds.

M. UPSTATE REGIONAL BLUEPRINT FUND AND DOWNSTATE REVITALIZATION FUND

In 2008, the State enacted legislation creating the Upstate Regional Blueprint Fund and the Downstate Revitalization Fund to promote economic development by helping finance capital investment projects. The Upstate Blueprint Fund and the Downstate Revitalization Fund

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(collectively, the "Funds") are administered by the Empire State Development Corporation ("ESD"). They have similar guidelines and requirements, but distinct geography and different funding allocations.

The Funds allow for a broad range of eligible applicants: for-profit businesses, not-for-profit corporations, municipalities, local development corporations, industrial development agencies, research and academic organizations, etc. Start-up companies are not eligible.

Funding is provided in three different funding tracks:

Business Investment Track for operating businesses making capital expenditures that will facilitate the creation of new jobs or the retention of jobs that are at risk. The applicant must provide a five-year job commitment. Recapture of this assistance is possible on a pro-rated basis if these commitments are not met.

Infrastructure Investment Track for projects that attract new businesses or expand existing businesses through developing transportation, water, sewer, communications and energy generation and distribution facilities. Infrastructure projects must serve unidentified users or multiple users. Job commitments are not required by the applicants. Projects that serve a single, identified user must apply for funding in the Business Investment Track.

Downtown Redevelopment Track for rehabilitation and new construction projects in downtown areas. These may be in a major commercial area of a large city or an important block in a smaller village center. A range of commercial uses, including retail and office, are eligible, as are hotels, cultural facilities and streetscape improvements. Job commitments are not required but will be viewed favorably. No speculative development will be assisted and a significant amount of the project's square footage must be pre-leased to be eligible.

The Funds can be provided in the form of subsidized loans at a 2% interest rate; convertible loans with interest only payments and forgiveness of principal as job commitments are met; and grants. Assistance is provided for a broad range of expenses, including acquisition, hard costs and soft costs. Funds will not be provided for working capital, operating expenses or refinancing of existing debt. Minimum assistance provided is $100,000 ($250,000 for subsidized loans) and the maximum amount is $5 million per project. ESDC funding cannot exceed 20% of the total project cost and applicants are required to provide a minimum of 10% equity contribution.

Due to limited funds, please contact your regional office for more information about funding availability.

N. NEW YORK MAIN STREET PROGRAM

The Housing Trust Fund Corporation ("HTFC" or "the Corporation") was established by Chapter 67 of the Laws of 1985, specifically under Section 45-a of the Private Housing Finance Law (PHFL), as a subsidiary public benefit corporation of the New York State Housing Finance Agency (HFA). The Law conferred a number of privileges, tax exemptions and powers to HTFC, including the authority to contract with the Division of Housing and Community Renewal (DHCR) to administer the Corporation's activities.

The mission of the Corporation, as originally established under Section 45-a and Article 18 of the PHFL, was to create decent affordable housing for persons of low-income by providing loans and grants for the rehabilitation of existing housing or the construction of new housing under the Low-Income Housing Trust Fund Program. This mission has been reinforced since then by the addition of many state and federally funded programs to HTFC's portfolio, including the state-funded New York Main Street Program ("NYMS Program").

The NYMS Program provides financial resources and technical assistance to cities, towns, villages, counties and non-profit organizations (the latter of which must have been in existence for at least one year and incorporated under the New York State Not-For-Profit Corporation Law) to help New York communities preserve and revitalize traditional main streets, downtowns and neighborhoods.

Eligible activities include building renovations for commercial and residential units, exterior renovations for storefront and façade improvements; renovations to establish or expand commercial, cultural or civic anchors that are key to local revitalization efforts; and streetscape enhancement activities. Funds, however, are not available for new construction.

The following activities can be funded in part through the NYMS Program:

Building Renovation – Matching grants may be awarded to building owners for renovation of mixed-use buildings. Building Renovation grant funds are used to renovate façades, storefronts and commercial interiors, with additional funding available for direct assistance to residential units. Streetscape enhancement funds are available for activities that enhance the renovation projects on

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a corridor, such as planting trees or installing permanent fixtures such as street furniture and trash cans. A streetscape enhancement grant will only be awarded as an activity ancillary to a building renovation project and cannot be applied for on its own.

Downtown Anchor – Matching grants may be awarded to a building owner for renovation of a standalone, single-site project. NYMS Downtown Anchor grant funds are used for interior and/or exterior building renovations. These funds are intended to help establish or expand cultural, residential or business anchors that are key to local revitalization efforts through substantial renovations. Downtown Anchor projects should be "shovel ready" at the time of application.

Technical Assistance: Grants are available to assist projects that will directly improve a community's capacity or readiness to administer a future New York Main Street building renovation program.

The local NYMS Program must be carried out in a concentrated mixed-use target area (generally no more than three contiguous blocks) that has experienced sustained physical deterioration, decay, neglect or disinvestment, and has a number of substandard buildings or vacant residential or commercial units. The target area must be located in a service area in which more than 50% of the residents earn less than 90% of the area median income of the surrounding community, or which has been designated by a State or Federal agency as an eligible area for the purposes of a community or economic development program. Buildings within the district or the district itself may also be eligible to be listed on the National Register of Historic Places or for local or State historic designation. Proposed service areas that are within officially designated service areas of Neighborhood or Rural Preservation Companies, for example, are considered eligible.

Awards are administered through the Regional Economic Development Council Initiative ("REDC"). In 2025, $4.2 million in grants were awarded to 12 projects to revitalize Main Streets throughout New York State. REDC accepted applications for its fifteenth round of funding through July 31, 2025.

O. EMPIRE STATE JOBS RETENTION PROGRAM

The Empire State Jobs Retention Program ("ESJRP") was created pursuant to Chapter 56 of the Laws of 2011 and enacted on December 9, 2011. The ESJRP was established to create financial incentives to retain strategic businesses and jobs that are at risk of leaving the state due to the impact on business operations of an event (such as a natural disaster) leading to an emergency declaration by the governor. The tax credit, which is administered by the Empire State Development Corporation, is based on a percentage of the gross wages paid for retained jobs that otherwise would have been impacted by the event.

Eligible taxpayers subject to tax under Article 9-A (franchise tax on business corporations), 32 (Franchise tax on banking corporations), and 33 (franchise tax on insurance corporations) may claim the credit, and a taxpayer that is a partner in a partnership, member of a LLC, or shareholder in a New York S Corp that qualifies for the credit may claim its pro rata share of the credit earned by the partnership, LLC or S Corp. To be a participant in the ESJRP, an eligible business must apply to, and be certified by, the Empire State Development Corporation. Applications must be made within 180 days of the declaration of an emergency by the governor in the county where the business is located. Elements of the program are found in Article 20 of the Economic Development Law, and sections 36 and 210.44 of the Tax Law.

P. OTHER AREAS OF ASSISTANCE

Given the wide range of programs and services offered by the State to its business community, it is impossible to describe all the areas of assistance which might be important to a company seeking to locate or expand in the State. However, just as a sampling, other areas of assistance include recycling market assistance, government procurement, women and minority business enterprises, film industry and ownership transition services.

Again, State staff will be pleased to work with any company to identify the scope and character of these services based on a prospect company's requirements.

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NEW YORK STATE EMPIRE ZONE TAX BENEFITS

See Prior Editions for details as this program has expired.

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NEW YORK STATE EXCELSIOR PROGRAM

BY CHRISTOPHER A. ANDREUCCI AND ROBERT J. RYAN

The Excelsior Jobs Program (the "Program") was introduced by Governor Paterson as part of the executive budget as a replacement for the Empire Zones Program, which sunset on June 30, 2010. The Program was enacted on June 22, 2010, as Chapter 59 of the Laws of 2010 Part MM, effective July 1, 2010, and codified in Article 17 of the Economic Development Law. The Program was enhanced on March 31, 2011, by Chapter 61 of the Laws of 2011 Part G. The Program is designed to encourage expansion in, and relocation to, New York in certain industries identified for growth. Program costs are capped at $500 million a year with a lifetime value of $2.25 billion.

A. ELIGIBILITY

The business activity at the location for the proposed project must meet the following requirements:

1. Job Creation Eligibility

	Type of Project	Minimum Jobs
1.	Scientific R&D	5
2.	Manufacturing	5
3.	Software Development	5
4.	Financial Services	25
5.	Agriculture	5
6.	Back Office	25
7.	Distribution	50
8.	Music Production	5
9.	Entertainment Company	100
10.	Life Science	5

OR

2. Investment Eligibility

The business activity at the location of the project is of the type contained in one of the 10 categories from above and (i) the business has and retains at least 25 employees (five employees for manufacturing) and (ii) passes a minimum cost benefit ratio of 10:1 (Investment, Wages and Benefits compared to Excelsior Tax Credits).

3. Green CHIPS Eligibility

To qualify as a Green CHIPS project, the following criteria must be met: (i) the project is within the semiconductor manufacturing and related equipment and material supplier sector; (ii) includes sustainability measures to mitigate the project's greenhouse gas emissions over its lifetime under a Green CHIPS sustainability plan; (iii) provides for the payment of not less than Federal prevailing wage rates for its project construction; (iv) makes specific and actionable commitments to worker and community investment under a Green CHIPS community plan; (v) will create at least 500 net new jobs and make at least $3 billion in qualified investment prior to the conclusion of its preliminary schedule of benefits; and (vi) will maintain a Green CHIPS benefit-cost ratio of at least 15:1, as calculated for the overall project term.

B. BENEFITS

Fully Refundable. 10-year benefit period commences when first Certificate of Tax Credits is issued.

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(1) Jobs Tax Credit – 6.85% of gross wages per net new job (7.5% for green project or Green CHIPS project jobs).

(2) Investment Tax Credit – 2% of Qualified Investment (5% for green project or Green CHIPS project and childcare services investments).

Qualified Investment:

- Tangible personal Property owned by business
- Depreciable per IRC Section 167
- Useful life of four or more years
- Acquired by purchase

Note – must choose between Excelsior ITC, Standard ITC or Brownfields ITC – election is irrevocable. However, a participant may claim both the Excelsior ITC and the NYS R&D Tax Credit. Lastly, expenses incurred prior to the date the Certificate of Eligibility is issued are not eligible.

(3) R&D Tax Credit – 50% of the portion of the businesses Federal R&D credit related to R&D expenditures in NYS capped at 6% of the R&D expenditures in NYS (8% for green project or Green CHIPS project). Note: If Federal R&D credit has expired, the Excelsior R&D credit will be calculated as if the Federal credit was in effect as of 2009.

(4) Real Property Tax Credits – Project must be a Regionally Significant Project or located in an Investment Zone of the former Empire Zones Program to receive this credit.

Credit calculated as follow:

* Year 1: 50% of eligible real property taxes after improvements.
* Year 2: 45%
* Year 3: 40%
* Year 4: 35%
* Year 5: 30%
* Year 6: 25%
* Year 7: 20%
* Year 8: 15%
* Year 9: 10%
* Year 10: 5%

Note: Eligible Real Property Taxes has the same definition as in the former Empire Zones Program. See Tax Law §15(e).

Regionally Significant Projects are as follows:	Min. Jobs Created	Investment
Financial Services	100	$3,000,000
Manufacturing	10	$1,000,000
Scientific R&D	10	$3,000,000
Agriculture	10	$250,000
Back Office	100	$3,000,000
Distribution	100	$15,000,000
Entertainment	200	N/A
Life Sciences	20	N/A
Other	150	$3,000,000

In addition to the above job creation and investment requirements, the project must export a substantial portion of its products or services outside of the state or metropolitan statistical area or county within the state.

C. PROCESS

(1) Application to Empire State Development through regional offices based upon the firm's plan for expansion or growth. A firm must agree to be permanently disqualified for empire zone benefits at any location or locations that qualify for Excelsior jobs program benefits if admitted into the Program.

(2) Empire State Development makes offer setting forth job creation and investment requirements, as well as a preliminary schedule of benefits which applicant may accept by executing the offer.

(3) Empire State Development will issue a Certificate of Eligibility. The effective date will be the date the business accepts the offer (i.e. date of execution). Note – Certificate of Eligibility does not guarantee benefits; however, only jobs, investments and R&D expenditures incurred after this date qualify for tax credits.

(4) In the first year the applicant wishes to start claiming the tax credits, the applicant must demonstrate to Empire State Development that it has achieved the job and or investment requirements as set for in the offer. Empire State Development will issue a Certificate of Tax Credit for one year, which will start the 10-year benefit period.

(5) A new Certificate of Tax Credit will be required in each of the 10 years in order for the applicant to claim the credits on its tax return.

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D. KEY POINTS

(1) The eligible business may only receive tax credits based upon the amount of jobs committed to, and approved in, the Offer by Empire State Development. For example, if a manufacturer commits to 40 jobs but creates 50 jobs, the business may only receive a maximum job tax credit on 40 jobs. If the manufacturer fails to satisfy the job creation projections, the credits will be reduced to an amount in proportion to the percentage of the job creation achieved. If the manufacturer fails to create at least 75% of the job creation projected, it will not receive job tax credits on any of the jobs created. However, as long as the manufacturer creates the minimum of 10 jobs, it will be able to remain in the program to access the other benefits, if eligible (i.e. ITC, R&D Credit, and Property Tax Credit).

(2) Assuming the manufacturer in the above example also committed to $1 million worth of qualified investments but actually invested $800,000. Since the manufacturer created at least 10 jobs to get into the program, it may receive a reduced ITC based upon the lower actual investment.

(3) Regionally Significant Projects must invest the minimum amount of investment to receive any credit and to stay in the Program, in addition to satisfying the minimum job requirements.

(4) The Excelsior Jobs Program is established as a discretionary program and not "as of right." Therefore, Empire State Development's offer letter may contain a preliminary schedule of benefits that are lower than what the credit could be. For example, assuming a manufacturer commits to creating 175 jobs, the offer letter from Empire State Development may only contain job tax credits based upon 80 jobs. The same applies to qualified investments.

(5) Only jobs, investments and R&D expenditures incurred after the effective date of the Certificate of Eligibility qualify towards satisfying commitments and obtaining tax credits.

(6) The benefit period is 10 years and commences upon the request by the eligible business for the first Certificate of Tax Credit.

(7) Green CHIPS projects are eligible for up to 20 years of tax credits, comprised of two 10-year benefit periods.

(8) The eligible business must be located in an Investment Zone or be a Regionally Significant Project to qualify for the real property tax credit.

(9) The tax credits are fully refundable.

(10) In determining target industries for eligibility purposes, it is the activity of the project that will be considered. For example, a retailer constructing a distribution center would be eligible.

Please Note: The Program's rules are currently in effect as 5 NYCRR Part 190. Therefore, the administration and implementation of this Program as set forth in this memo is subject to change by Empire State Development. The regulations are posted on Empire State Development's website at https://esd.ny.gov/sites/default/files/media/document/Excelsior-Regulations-122925-update.pdf

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TAX CREDITS UNDER NEW YORK'S BROWNFIELD CLEANUP PROGRAM

BY ROBERT G. MURRAY AND ROBERT J. RYAN

New York State's Brownfield Cleanup Program ("BCP") was established to encourage voluntary remediation and redevelopment of brownfield sites. From a business perspective, the most significant component of the BCP is, in addition to certain environmental liability relief, the ability to claim refundable New York State tax credits made available to State taxpayers who voluntarily clean up and develop brownfield sites under the BCP. From an economic development perspective, BCP tax credits can be utilized to facilitate deal structure, lending, and to encourage the remediation and development of contaminated properties.

A. INTRODUCTION

Eligibility for the BCP is conditioned upon the New York State Department of Environmental Conservation ("DEC") accepting the taxpayer's application for participation in the program. The table below illustrates how the applicable BCP program (BCP 1.0, 2.0, or 3.0) dictates the availability of BCP tax credits based on the acceptance date of a BCP application and the date a Certificate of Completion ("COC") is received for the successful remediation of the site. Note that for new applications only the BCP 3.0 program is available.

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BCP Program	Tax Credits Available	Tax Credit Applicable Percentage	COC Receipt
BCP 1.0 Accepted prior to 6/23/2008	Site Preparation Credit (SPC) Groundwater Remediation Credit (GRC) Tax Credit for Remediated Brownfields (TCRB) Environmental Remediation Insurance Credit (ERIC) Tangible Property Credit (TPC) *No Cap	10-22% of costs, no cap 10-22% of costs, no cap. Max 100% real property tax Capped at $30,000 10-22% of tangible property	Before 12/31/17
BCP 2.0 Accepted Between 6/23/2008 and 7/1/2015	SPC GRC TCRB ERIC TPC ** Capped	10-24% of costs, no cap 10-24% of costs, no cap Max 100% real property tax Capped at $30,000 10-24% of tangible property costs, but TPC cannot exceed lesser of 3x site prep costs for non-manufacturing or $35,000,000, or 6x site prep costs for manufacturing project or $45,000,000	Before 12/31/19
BCP 3.0 Accepted Between 7/1/2015 and 12/31/32	SPC GRC TPC **Capped	22-50% of costs 22-50% of costs 10-24% of tangible property costs, but TPC cannot exceed lesser of 3x site prep costs for non-manufacturing or $35,000,000 or 6x site prep costs for manufacturing project, or $45,000,000	Before 12/31/36

1. Brownfield Site Definition

A "Brownfield Site" is, since the implementation of the BCP 3.0 program, defined as "any real property where a contaminant is present at levels exceeding the soil cleanup objectives or other health-based or environmental standards, criteria or guidance adopted by the department that are applicable based on the reasonably anticipated use of the property, in accordance with applicable regulations."[60] This definition shifts the focus to the presence of contamination on the site, rather than the complication of reuse. As long as the contaminant(s) at the site are in excess of the standards set forth by DEC, the site qualifies as a Brownfield Site. This now includes sites listed as "Class 2" sites on the State superfund registry ("Class 2 Sites"), and hazardous waste treatment, storage, or disposal facilities having interim status ("Hazardous Facilities"), provided the conditions discussed below are met. Sites contaminated by the presence of groundwater contamination or vapors from off-site are not eligible for TPC credits, as discussed below, along with sites previously remediated for its then intended use under any DEC remediation program

This Brownfield Site definition will require BCP applicants to demonstrate, through the submission of a Phase II report or sampling data, the actual presence of contamination based on DEC standards.

Note that the BCP 3.0 program also authorizes the DEC to promulgate rules to govern and administer a BCP-EZ program, which is a more streamlined program. Under such a program, cleanups must still satisfy §§ 27-1415 and 27-1414 of the New York Environmental Conservation Law. However, the DEC is permitted to waive specific public participation requirements and allow

[60] See N.Y. Env. Cons. Law § 27-1405(2).

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applicants to petition the DEC for more relaxed cleanup standards under special circumstances. A Brownfield Site remediated under the BCP-EZ program is not entitled to receive any of the BCP tax credits as described herein.

2. BCP Tax Credits in General

In sum total, the BCP consists of three refundable[61] New York State tax credits: (i) the Brownfield Redevelopment Tax Credit ("BRTC"), which is an investment incentive tax credit and consists of three component parts, including the SPC, the TPC, and the GRC, as identified in the table, above, and further described below; (ii) the TCRB, identified in the table above and described below, which is a tax credit based on the Brownfield Site's real property taxes; and (iii) the ERIC, identified in the table above and described below, which is a credit based on environmental remediation insurance premiums, if any. The BRTC is available under the BCP 1.0, 2.0 and 3.0 programs, however, the TCRB and ERIC component parts of the BRTC are only available under the BCP 1.0 and 2.0 programs.

a. Brownfield Redevelopment Tax Credit

The BRTC is a fully refundable investment incentive tax credit available to taxpayers who have satisfactorily cleaned up a Brownfield Site and received a COC with respect to such remediation activities. The BRTC is applied against a taxpayer's income/franchise tax and is equal to the sum of the following three components: (i) the applicable percentage of the Site Preparation Credit Component (capitalized costs paid in connection with remediating the site and preparing the site for erection of a building or establishing the site as usable for its end use); (ii); the applicable percentage of the On-site Groundwater Remediation Credit Component (capitalized costs paid or incurred for on-site ground water remediation, if any); and (iii) the applicable percentage of the Tangible Property Credit Component (capitalized costs paid for new tangible property placed upon the site including buildings and structural components of buildings).

3. BCP 1.0 – SPC and GRC Applicable Percentage

For projects enrolled in the BCP 1.0 program, the SPC and GRC tax credits are calculated as follows:

Taxpayer	Base Percentage	Unrestricted Use (+2%)	Environmental Zone (+8%)
Individual	10%	12%	18% or 20%
All Others	12%	14%	20% or 22%

Specifically, the SPC and GRC component parts are calculated based on the "applicable percentage" of such capitalized costs which are paid in connection with qualifying a site for a COC and all other site preparation costs paid or incurred in connection with preparing/improving a site for the erection of a building or a component of a building, or otherwise to establish a site for useable industrial, commercial (including the commercial development of residential housing), recreational or conservation purposes with respect to SPC costs, and such capitalized costs paid in connection with the remediation of on-site ground water contamination and that are incurred to implement a requirement of the remediation work plan for a qualified site with respect to GRC costs. The credit shall be 10% in the case of credits claimed under Article 22 of the New York Tax Law, and 12% in the case of credits claimed under Articles 9, 9-A of the New York Tax Law. If the COC indicates that the qualified site has been remediated to Track 1, the applicable percentage as originally set forth shall be increased an additional 2%. In addition, where at least 50% of the area of the qualified site relating to the credit provided for in this paragraph is located in an Environmental Zone ("En Zone"), the applicable percentage shall be increased by an additional 8%. An EN Zone is an area designated as such by the Commissioner of Economic Development based on certain poverty and unemployment data. In all cases, SPC and GRC costs paid or incurred by the taxpayer shall only include costs paid or incurred by the taxpayer on or after the date of execution of the Brownfield Site Clean-Up Agreement between the taxpayer and the DEC.

[61] All of the BCP tax credits are fully refundable to the extent any credits remain after off-setting any New York State income or franchise tax liabilities (if any).

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4. BCP 2.0 and BCP 3.0 - SPC and GRC Applicable Percentage

For projects enrolled in the BCP 2.0 or 3.0 programs, the SPC and GRC tax credits are calculated as follows:

Level of Cleanup	Applicable Percentage
Soil cleanup for Unrestricted Use – Track 1	50%
Soil cleanup for Residential Use	40%
Soil cleanup for Residential Use –Track 4	28%
Soil cleanup for Commercial Use	33%
Soil cleanup for Commercial Use –Track 4	25%
Soil cleanup for Industrial Use	27%
Soil cleanup for Industrial Use –Track 4	22%

In general, under current law, SPC costs means all amounts properly chargeable to a capital account which are necessary to implement a site's investigation, remediation, or qualification for the DEC to issue a COC, and shall include costs of: excavation; demolition; activities undertaken under the oversight of the New York State Department of Labor or in accordance with standards established by the New York State Department of Health to remediate and dispose of regulated materials including asbestos, lead or polychlorinated biphenyl's; environmental consulting; engineering; legal costs; transportation, disposal, treatment or containment of contaminated soil; remediation measures taken to address contaminated soil vapor; cover systems consistent with applicable regulations; physical support of excavation; dewatering and other work to facilitate or enable remediation activities; sheeting, shoring, and other engineering controls required to present off-site migration of contamination from the qualified site or migrating onto the qualified site; and the cost of fencing, temporary electric wiring, scaffolding, and security facilities until such time as the COC has been issued. SPC costs shall also include all costs paid or incurred within sixty months after the last day of the tax year in which the COC is issued that are necessary for compliance with the COC or the remedial programs defined in the COC including, but not limited to, institutional controls, engineering controls, an approved site management plan and an environmental easement. SPC costs shall not include the costs of foundation systems that exceed the cover system requirements in the regulations applicable to the qualified site.

The GRC costs, under current law, generally include all amounts properly chargeable to a capital account which are paid or incurred which are necessary to implement a site's groundwater investigation, remediation, or qualification for a COC not already covered under SPC costs, and shall include costs of: environmental consulting; engineering; legal costs; transportation, disposal, treatment or containment of contaminated groundwater; sheeting, shoring, and other engineering controls required to prevent off-site migration of groundwater contamination from the qualified site or migrating onto the qualified site; and costs of fencing, temporary electric wiring and security facilities until such time as the COC is issued. GRC costs shall include all costs paid or incurred within sixty months after the last day of the tax year in which the COC is issued that are necessary for compliance with the COC or the groundwater remedial program defined in the COC including but not limited to institutional controls, engineering controls, an approved site management plan specific to on-site groundwater remediation, and an environmental easement.

In all cases, SPC and GRC costs paid or incurred by the taxpayer shall only include costs paid or incurred by the taxpayer on or after the date of execution of the Brownfield Site Clean-Up Agreement between the taxpayer and the DEC.

As of the 2022 amendments to the BCP, with respect to BCP sites which have obtained a COC on or after July 1, 2015 but on or before June 24, 2021[62], site preparation costs and ground water remediation costs incurred within eighty-four (84)

[62] See N.Y. TAX § 21(b)(2).

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months [63] following the issuance of the BCP site's COC can be included as eligible costs when calculating the SPC and GRC, extending the applicable period by twenty-four (24) months. In addition, provided the BCP's sites COC was obtained within the above-specified timeframe, the SPC and GRC can be claimed up to eighty-four (84) months after the issuance of the BCP site's COC,[64] providing applicants an additional twenty-four (24) months to earn the SPC and GRC.

5. BRTC – Tangible Property Credit

The TPC credit availability, calculation, and cap varies greatly between the BCP 1.0. 2.0, and 3.0 programs.

6. BCP 1.0 – TPC Applicable Percentage

For BCP sites enrolled in the BCP 1.0 program, the TPC tax credit is calculated in the same manner as the SPC and GRC is calculated for the BCP 1.0 program as follows:

Taxpayer	Base Percentage	Unrestricted Use (+2%)	Environmental Zone (+8%)
Individual	10%	12%	18% or 20%
All Others	12%	14%	20% or 22%

In all cases, the cost or other basis for federal income tax purposes of tangible personal property and other tangible property including buildings and structural components thereof, which constitute qualified tangible property, shall only include costs paid or incurred by the taxpayer on or after the date of execution of the Brownfield Site Cleanup Agreement between the taxpayer and the DEC. The TPC shall be allowed for the taxable year in which such qualified tangible property is placed in service on a qualified site with respect to which a COC has been issued to the taxpayer for up to one hundred twenty (120) months after the date of the issuance of the COC. The TPC is allowed with respect to property leased to a second party but only if such second party is a non-responsible party (a party not responsible for the disposal of hazardous waste or the discharge of petroleum at the site) or an innocent land owner (a responsible party wherein such party's liability arises solely from operation of the site subsequent to the disposal of the hazardous waste of petroleum discharge as certified by the commissioner of the Department of Environmental Conservation).

7. BCP 2.0 Program – TPC Applicable Percentage

Under the BCP 2.0 program, the applicable percentage for the TPC is slightly increased by permitting an additional two percent to be claimed for tangible property costs expended for site redeveloped in conformance with the goals and priorities as established within a Brownfield Opportunity Area ("BOA") plan. Thus, the applicable percentages for the TPC, under the BCP 2.0 program, remain unaffected, as described in the table below (base level component, increased by cleanup level and sites in an Environmental Zone), but is further increased by an additional two percent for location within a BOA as follows:

Taxpayer	Base Percentage	Unrestricted Use (+2%)	Environmental Zone (+8%)	BOA Consistency (+2%)
Individual	10%	12%	18% or 20%	20% or 22%
All Others	12%	14%	20% or 22%	22% or 24%

Under the BCP 2.0 program, the total TPC available for any qualified site is capped and the credit amount, as calculated per above, shall not exceed the lesser of $35 million, or three times the sum of the costs included in the calculation of the site preparation credit component and the on-site groundwater remediation credit component for a non-manufacturing site. However, in the case of qualified

[63] Time period commences January 1st after the tax year the COC was issued, amends previous sixty (60) month (five (5) year) timeframe. See N.Y. TAX § 21(b)(2); § 21(b)(4).

[64] Amends previous five (5) year timeframe. See N.Y. TAX § 21(a)(2), (4); N.Y. TAX § 21(a)(5)

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sites that will be used primarily for manufacturing activities, the TPC available for such a qualified site, as calculated per above, shall not exceed the lesser of $45 million, or six times the sum of the costs included in the calculation of the site preparation credit component and the on-site groundwater remediation credit component.

8. BCP 3.0 Program – TPC Applicable Percentage

Under the BCP 3.0 program, several sites were determined ineligible for the TPC. Specifically, sites are not eligible for the TPC if (a) the contamination from groundwater or soil vapor is solely emanating from property other than the site that is the subject of the BCP application, or (b) the DEC has determined that the site has previously been remediated pursuant to the BCP, the state superfund program, the Environmental Restoration Program for municipal sites, the Oil Spill Program of the N.Y. Navigation Law, or RCRA, such that the site may be developed for its then intended use.

The tax credit applicable percentages for the TPC have been amended and begin at a 10% base level for all applicants. However, the credit amount can increase by an additional 5% for a site within an En Zone, an additional 5% for a site located within a BOA and developed in conformance with the goals and priorities established for that applicable BOA, an additional 5% for an Affordable Housing Project[65], an additional 5% for a site to be used primarily for manufacturing activities, and another additional 5% for sites remediated to Track 1. Pursuant to the 2022 BCP amendments, BCP sites located within a disadvantaged community[66] and BCP sites utilized as renewable energy facility sites[67] can earn an additional 5% TPC credit. The applicable percentage maximum is capped at 24%. The BCP 3.0 TPC applicable percentage allocations are determined as follows

Baseline Credit	Environmental Zone	Track 1	BOA Location	Affordable Housing Project	Manufacturing Project	Disadvantaged Community	Renewable Energy
10%	+5%	+5%	+5%	+5%	+5%	+5%	+5%

65 Affordable Housing Project" means, for purposes of the BCP and section twenty-one of the tax law only, a project that is developed for residential use or mixed residential use that must include affordable residential rental units and/or affordable home ownership units. (1) Affordable residential rental projects under this subdivision must be subject to a federal, state, or local government housing agency's affordable housing program, or a local government's regulatory agreement or legally binding restriction, which defines (i) a percentage of the residential rental units in the affordable housing project to be dedicated to (ii) tenants at a defined maximum percentage of the area median income based on the occupants' households annual gross income. (2) Affordable home ownership projects under this subdivision must be subject to a federal, state, or local government housing agency's affordable housing program, or a local government's regulatory agreement or legally binding restriction, which sets affordable units aside for home owners at a defined maximum percentage of the area median income; and (3) a project that demonstrates the project is the subject of a determination by a federal, state or local government housing agency that all or a portion of the project or site will qualify for benefits, including but not limited to real property taxation exemptions, is or will be eligible under an affordable housing program which requires that a percentage of residential rental or home ownership dwelling units be dedicated to tenants or homeowners at a defined maximum percentage or percentages of area median income based on the occupants' households annual gross income. Such federal, state or local affordable housing program shall confer a benefit to the project. For the purposes of this subdivision, the term "benefit" shall be broadly construed, and shall include, but not be limited to, tax benefits, including real estate tax benefits, tax credits, bond financing, subsidy financing, and zoning variances or waivers. To demonstrate eligibility under this subdivision, the project must present a certification of compliance or other evidence of eligibility by a federal, state, or local government affordable housing agency that such project is an affordable housing project. See 6 NYCRR §375-3.2(a)

66 "Disadvantaged communities" shall be identified based on geographic, public health, environmental hazard, and socioeconomic criteria, which shall include but are not limited to: i. areas burdened by cumulative environmental pollution and other hazards that can lead to negative public health effects; ii. areas with concentrations of people that are of low income, high unemployment, high rent burden, low levels of home ownership, low levels of educational attainment, or members of groups that have historically experienced discrimination on the basis of race or ethnicity; and iii. areas vulnerable to the impacts of climate change such as flooding, storm surges, and urban heat island effects. See N.Y. Env. Cons. Law § 75-0111(1)(c).

67 "Renewable energy facility site" shall mean real property that has a primary use for: (1) a renewable energy system, as defined in section sixty-six-p of the Public Service Law; or (2) any co-located system storing energy generated from such a renewable energy system prior to delivering it to the bulk transmission, sub-transmission, or distribution system. Such facility shall be used primarily for energy generation. "Renewable energy facility site" shall not include real property that has a primary use for the production of fossil fuel-based energy. See N.Y. Env. Cons. Law § 27-1405(33) and 6 NYCRR §375-3.2(l)

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Also, under the BCP 3.0 program, just like the BCP 2.0 program, the total TPC available for any qualified site is capped and the credit amount, as calculated per above, shall not exceed the lesser of $35 million, or three times the sum of the costs included in the calculation of the site preparation credit component and the on-site groundwater remediation credit component for a non-manufacturing site and, in the case of qualified sites that will be used primarily for manufacturing activities, the TPC component available for such a qualified site, as calculated per above, shall not exceed the lesser of $45 million, or six times the sum of the costs included in the calculation of the site preparation credit component and the on-site groundwater remediation credit component.

In addition, under the BCP 3.0 program, the TPC now includes only costs for tangible property that has a depreciable life for federal income tax purpose of 15 years or more, and costs of demolition and foundation costs that are not properly included in the SPC component, as well as costs of non-portable equipment, machinery, associated fixtures, and those appurtenances used on the site regardless of their depreciable life.

There is a geographic limitation within the BCP 3.0 program on the ability to claim the TPC for sites located within New York City. Under the BCP 3.0 program, and only for a site located within New York City, any applicant seeking a determination that the site is eligible for the TPC shall submit information sufficient to demonstrate at least one of the following required criteria: (1) at least half the site is located in an En Zone; (2) the property is either Upside Down[68] or Underutilized[69]; (3) the project is an Affordable Housing Project[70]; (4) the project is within a disadvantaged community[71]; or (5) the project is being developed as a renewable energy facility[72]

Guidance promulgated by the New York State Department of Tax and Finance indicates that the definition of Affordable Housing Project now includes projects situated on a brownfield site that can demonstrate the qualification for benefits or eligibility under an affordable housing program[73]. To qualify for the 5% increase in TPC noted above, the project must either provide (i) a certificate of compliance, or (ii) other evidence of eligibility issued by applicable federal, state or local government affordable housing agency. Note that for a BCP site that is determined to qualify for the BCP because it is an Affordable Housing Project, the portion of the eligible costs to be included in the calculation of the TPC component will be determined by multiplying the total costs qualified for the TPC by a fraction, the numerator of which shall be the square footage of the space of the affordable housing units dedicated to residential occupancy and the denominator of which shall be the total square footage of the building. BCP applicants seeking an eligibility determination as a BOA for BCP sites in New York City must now meet the conformance determinations as defined in the New York General Municipal Law.[74]

Last, under the BCP 3.0 program, payments made as a related party serve fee (developer fee), defined as fees calculated as a percentage of a project and/or acquisition costs, in consideration

[68] "Upside Down" means as of the date of application to the BCP, a property where the projected and incurred cost of the investigation and remediation which is protective for the anticipated use of the property equals or exceeds seventy-five percent of its independent appraised value, appraised under the hypothetical condition that the property is not contaminated. See N.Y. Env. Cons. Law § 27-1405(30) and 6 NYCRR 375-3.2(p).

[69] "Underutilized" means as of the date of application to the BPC, real property on which no more than fifty percent of the permissible floor area of the building or buildings is certified by the applicant to have been used under the applicable base zooning for at least three years prior to the application, which zoning has been in effect for at least three years' and (i) the proposed use is at least seventy-fiver percent for industrial uses, or (ii) at which (a) the proposed use is at least seventy-five percent for commercial or commercial and industrial uses, (b) the proposed development could not take place without substantial government assistance, where substantial government assistance means a substantial loan, grant, land purchase subsidy, land purchase cost exemption or waiver, or tax credit, or some combination thereof, from a governmental entity; (c) one or more of the following conditions exist – the property tax payment have been in arrears for at least five years immediately prior to the application, or a building is presently condemned or exhibits documented structure deficiencies presenting a public health or safety hazard, or there are no structures. Note substantial government assistance is defined to mean substantial loan, grant, land purchase subsidy, land purchase costs exemption, or tax credit, or some combination thereof, from a governmental entity. See 6 NYCRR §375-3.2(o).

[70] See *Id*. at §375-3.2(a).

[71] See *Id*. at Part 375-3.2(f).

[72] See *Id*. at Part 375-3.2(l).

[73] See NY St Dept of Taxation & Fin Advisory Op No. TSB-M-23) (1)C, (1)I

[74] In establishing [conformance determination] criteria,... the following considerations [will guide]: how the proposed use and development advances the designated brownfield opportunity area plan's vision statement, goals and objectives for revitalization; how the density of development and associated buildings and structures advances the plan's objectives, desired redevelopment and priorities for investment; and how the project complies with zoning and other local laws and standards to guide and ensure appropriate use of the project site.

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of services rendered, may be included in the TPC. Specifically, a related party service fee may be claimed as a part of the TPC to the extent the fee is earned and thereinafter paid and is only restricted from being claimed for the SPC and GRC.

As of the 2022 BCP amendments, the TPC may be claimed up to one hundred eighty (180) months (fifteen (15) years) after the date of the issuance of the COC for BCP sites accepted into the BCP from March 20, 2010, to December 31, 2015.[75]

The 2022 BCP amendments have also amended the definitions of "buildings" and "eligible components of buildings" for the purposes of the Internal Revenue Code for BCP sites that are compliant with Track 1 remediation standards as of the 2022 tax year. The definition of "buildings" now includes athletic facilities including, but not limited to stadiums, baseball parks, and basketball courts. In addition, eligible components of buildings" also includes sports field turf, site lighting, sidewalks, access and entry ways, and other improvements added to land. Accordingly, these types of buildings and structural improvements are now eligible for inclusion in the definition of the TPC and are eligible for inclusion in the underlying calculation of the TPC.[76]

Under existing BCP rules, the TPC is generally claimed at the time the property is "placed into service." However, pursuant to recent guidance issued by the New York State Tax Department, tangible property components of eligible affordable housing projects, condominiums, and cooperative housing projects, are considered to be "placed in service" when a certificate of occupancy ("CO") (either temporary or final) is issued.[77] If utilizing this method of claiming the TPC for an eligible project, the TPC must be claimed the later of either (1) the year that the CO is issued, or (2) the year that the COC is issued. The Tax Department has specified that costs when calculating the credit: (1) may only be claimed once when the property is placed in service; (2) cannot include costs for repairs, replacements, and improvements to property previously placed in service; and (3) may not include costs incurred after the issuance of the final CO.

9. Tax Credit for Remediated Brownfields – BCP 1.0 and 2.0 Programs

The TCRB is only available under the BCP 1.0 and 2.0 programs. It is a refundable New York State tax credit based on the amount of real property taxes imposed on a qualified site and the number of employees (employment number factor) at the site, and can be claimed by a taxpayer (developer) who is an owner of a qualified site and applied against the tax imposed under Articles 9, 9-A, 22, 32 or 33 of the Tax Law. The TCRB shall be allowed for 10 consecutive years wherein the amount of the credit shall be 25% of the product of: (i) the benefit period factor; (ii) the employment number factor; and (iii) the eligible real property taxes paid or incurred by the developer of the qualified site during a taxable year. Note that if the real property, which is subject to the TCRB, is a qualified site located in an Environmental Zone, then the amount of the credit shall be 100% of the aforementioned product. However, in any case, the amount of the TCRB may not exceed the credit limitation, as described below.

The "benefit period factor" is a numerical value corresponding with a TCRB benefit period of 10 consecutive taxable years beginning in the tax year during which the COC is issued or the taxpayer's first tax year commencing after March 31, 2005, whichever is later. The benefit period factor is 1.0 for each year of the ten-year benefit period.

The benefit period factor is then multiplied by the employment number factor. The "employment number factor" is based on the average number of full-time employees, excluding executive officers, employed by at a qualified site, plus the average number of full-time employees employed by a lessee or lessees of a portion of such a qualified site, where such employees are employed at such site during a taxable year. When the average number of full-time employees as expressed above is at least 25 but less than 50, the employment number factor is .25. When the average number of full-time employees as expressed above is at least 50 but less than 75, the employment number factor is .50. When the average number of full-time employees as expressed above is at least 75 but less than 100, the employment number factor is .75. Finally, when the average number of full-time employees is at least 100 or more, the employment number factor is 1.

The product of the benefit period factor and the employment number factor is then multiplied by the eligible Real Property Taxes. "Eligible real property taxes" means taxes imposed on real property which consists of a qualified site owned by the developer, provided such taxes become a lien on the

[75] See N.Y. Tax § 21(a)(3)(i).
[76] Id.
[77] See NYS Tax Dept. TSB-M-23(1)(C), (1)I

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real property in a period during which the real property is a qualified site. Payments in lieu of taxes with respect to a qualified site by the developer to the State, a municipal corporation or a public benefit corporation shall also be included in the term eligible real property taxes, subject to certain limitations. The product of this calculation, then multiplied by either 25% or 100%, as described above, equals the potential TCRB that may be claimed.

The potential TCRB is subject to a credit limitation, which is the product of (i) $10,000, and (ii) the average number of full-time employees employed at a qualified site and the lessee or lessees of a portion of such qualified site during the tax year.

10. Environmental Remediation Insurance Credit – BCP 1.0 and 2.0 Programs

The ERIC is only available under the BCP 1.0 and 2.0 programs. It is a credit equal to the lesser of $30,000 or 50% of the premiums paid by a taxpayer for environmental remediation insurance issued with respect to a qualified site, provided such premium or premiums are paid on or after the date of execution of the Brownfield Site Cleanup Agreement. The ERIC can be applied by the taxpayer against the amount of tax imposed under Articles 9, 9-A, 22, 32 or 33 of the Tax Law. The term "environmental remediation insurance" shall mean that type of insurance described in § 3447 of the New York Insurance Law, and includes insurance containing any of the following coverage or substantially similar coverage for: (i) the costs of on-site cleanup of pre-existing pollution conditions from the insured property which are outside the scope of the remedial work plan pursuant to issuance of a COC for such insured property; (ii) third-party claims for on-site bodily injury and property damage resulting from pre-existing pollution conditions outside the scope of the remedial work plan pursuant to issuance of a COC for the insured property; (iii) coverage which caps clean-up costs relating to the remedial work plan; and (iv) coverage for the costs of State re-openers pursuant to fill any gap in any liability limitation provided by the State.

B. NEW EXPIRATION DATES ESTABLISHED BY THE 2022 AMENDMENTS

Amendments made to the BCP program in 2022 established new expiration dates relating to specific tax credits under the BCP as discussed above. Per the 2015 amendments to the BCP, the BRTC was not applicable to any sites accepted in the BCP after December 31, 2022, provided however that any sites accepted on or before December 31, 2022 must have received a COC to qualify for any such BCP tax credits on or before March 31, 2026. As amended by the 2022 BCP amendments, sites accepted into the BCP Program on or before December 31, 2032 must receive a COC on or before December 31, 2036.

Applicable BCP Sunset Dates

BCP Tax Credit Structure	Must Receive Certificate of Completion By:
BCP 1.0	December 31, 2017
BCP 2.0	December 31, 2019
BCP 3.0	December 31, 2036

Any BCP 1.0 or 2.0 program site which has not received a COC by the above applicable date will not be disqualified from receipt of credits under BCP, but rather, such site will be forced into the BCP 3.0 credit scheme.

Importantly, failure of a BCP 3.0 site (or a new BCP 1.0 or BCP 2.0 that failed to obtain a COC by the applicable date, forcing such site into BCP 3.0) to obtain a COC by December 31, 2036 will disqualify the site from any BCP credits.

C. 2022 AMENDMENTS TO BCP: $50,000 APPLICATION FEE FOR NEW BCP SITES

As of January 15, 2025, applicants to the BCP are required to pay a non-refundable $50,000 fee to accompany any newly executed Brownfield Cleanup Agreements ("BCA") submitted to the DEC,[78]- which will not be factored into the project costs used to calculate tax credits under the BCP. Pursuant to the 2022 Amendments, the DEC may waive this fee upon a showing of financial hardship by the applicant, where the applicant must demonstrate that "but for the program fee, remediation of the brownfield site would not be economically viable."[79] To determine whether a financial hardship exists, the DEC will utilize a factor test[80] to evaluate the applicant's alleged hardship, and the Act further provides the DEC shall establish regulations governing the financial hardship

[78] See N.Y. ENVTL. CONSERV. § 27-1409(13).

[79] *Id.*

[80] "[T]he department will consider whether the applicant has waived their rights to tax credits, whether the location of the proposed brownfield site is in a disadvantaged community or the proposed brownfield site is being developed as an affordable housing project, the assets and income of the applicant, and any other factors deemed relevant." Id.

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evaluation process.. Pursuant to the 2025 Rules (as defined below), the DEC may waive the fee if: (i) for an Affordable Housing Project, the applicant and the DEC agree to a provision in the BCA that the applicant will develop the brownfield site with the dedication of 100% of the residential rental or 100% of the home ownership units to tenants or homeowners at a defined maximum percentage of area median income; (ii) an applicant otherwise eligible for TPC and the a DEC agree to a provision in the BCA which states the applicant waives its eligibility for TPC under Section 21 of the Tax Law; (iii) the applicant is exempt from taxes under articles nine ("Corporation Tax"), nine-a ("Franchise Tax on Business Corporations"), twenty two ("Personal Income Tax") or thirty three ("Franchise Tax on Insurance Companies") of the tax law; or (iv) more than half of the brownfield site is in a disadvantaged community, and the applicant demonstrates but for the program fee, the remediation and redevelopment of the brownfield site would not be financially viable for the applicant and economically viable in the disadvantaged community.[81]

D. 2025 AMENDMENTS TO THE BCP REGULATIONS

As discussed above, effective as of December 31, 2025, the DEC promulgated new rules (the "2025 Rules"), amending, in part, the regulations for the administration of the BCP codified at 6 NYCRR Part 375. The 2025 Rules were promulgated to bring the regulations in accordance with the 2022 Amendments and the 2015 Amendments. Notably, the 2025 Rules revised and updated various SCOs on average by a factor of two or three, added two new chemicals, aniline and nitrobenzene to the remediation tables,[82] clarified that a volunteer may now be required to conduct off-site field investigation and sampling of soil vapor and groundwater,[83] modified the requirements for receipt of TPC in New York City,[84] amended cleanup tracks for sites when Institutional Controls/Engineering Controls are used,[85] added or amended various definitions per the 2022 Amendments[86], and amended various other provisions

Under the 2025 Rules, a daily report must be submitted to the DEC during remediation work detailing daily field activities, including: (i) an update of progress made during the reporting day; (ii) the locations of work/site activities on a site map; (iii) quantities and descriptions of materials imported to and exported from the site; (iv) a summary of any and all complaints with relevant details; (v) a summary of Community Air Monitoring Plan findings, including exceedances; (vi) an explanation of any notable site conditions; and (vii) any deviations from the approved work plan.[87] The daily report is aimed to enhance consistency in reporting for the final engineering report. A new work plan may be required when there is a change of use involving physical alteration at a brownfield site that involves activity not covered in the initial work plan.[88]

Additionally, under the 2025 Rules, Class 2 Sites and Hazardous Waste Facilities may be eligible for enrollment into the BCP, provided the site is owned (or under contract to be owned) by a volunteer, and the DEC determines there is no viable responsible party, based on a "Potentially Responsible Party Search" submitted by the volunteer at the time of application to the BCP.[89] In lieu of the typical alternatives analysis utilized to select a remedy or "Track" for a brownfield site accepted into the BCP, Class 2 Sites will be bound to implement the on-site elements of a previously issued Record of Decision, or if not issued, then the DEC will select a remedy from a feasibility study conducted pursuant to 6 NYCRR Part 2.8(c) and 2.8(e).

[81] 6 NYCRR 375-3.5(g).
[82] *Id*. at Part 375-6.
[83] *Id*. at Part 375-3.8(b)(2),
[84] *Id*. at Part 375-3.3(f).
[85] *Id*. at Part 375-3.8(e).
[86] *Id*. at Part 375-3.2.
[87] *Id*. at Part 375-1.6(a)(3),
[88] *Id*. at Part 375-1.11(d)(2).
[89] A "PRP Search means a search to identify potentially responsible parties (PRP) who may be legally liable for contamination at a particular property, including, but not limited to the current owner/operator, the owner/operator at the time of disposal of hazardous waste/substances, persons who arranged for the disposal or treatment of hazardous waste/substances, and persons who transported and chose the disposal location of hazardous waste/substances." 6 NYCRR § 375-2(k). In supporting documentation, the DEC noted this cost will be at a minimum of $25,000, and potentially more when ownership is complicated.

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EMPIRE STATE FILM PRODUCTION TAX CREDIT PROGRAM

BY ROBERT J. RYAN

A. PRODUCTION TAX CREDIT

To encourage production companies to film in New York, productions which comply with certain requirements may be eligible for a tax credit of 30% percent of qualified production costs. This tax credit is funded at $700 million a year through 2036.

The Program is limited to qualified feature-length films, television series, relocated television series, television pilots, and films for television.

"Qualified Production Costs" means production costs only to the extent such costs are attributable to the use of tangible property or the performance of services within the state directly and predominantly in the production of a qualified film. In the case of an eligible relocated television series, the term "qualified production costs" shall include, in the first season that the eligible relocated television series is produced in New York after relocation, qualified relocation costs. Provided, however, that the aggregate total eligible qualified production costs for producers, writers, directors, performers (other than background actors with no scripted lines), and composers shall not exceed forty percent of the aggregate sum total of all other qualified production costs.

A production company that undertakes multiple productions in NYS may be eligible for an additional 5-10% on Qualified Production Costs. Also a production may receive an additional 10% credit for scoring costs if the production's scoring costs include payments to a minimum of five musicians.

The production credit is available for companies that film a substantial portion of their project in NYS. Eligibility requirements vary based on the type of film, production company and the budget.

The application process commences with an online initial application submitted prior to the start of principal and ongoing photography. Once the initial application is deemed complete, the applicant is eligible to file a final application based on actual project information. After review of the final application a Certificate of Tax Credit may be issued.

B. POST-PRODUCTION TAX CREDIT

To encourage companies to post their film projects in New York and help create and maintain film industry jobs, productions which comply with requirements may be eligible for a fully refundable tax credit of 30% of qualified post-production expenses. This tax credit program is funded at $45 million a year through 2036.

The Post-Production Program is limited to the post-production of feature films, television series, relocated television series, television pilots, and films for television and is available when the project was filmed predominantly outside of the State and the film production company contracts their post-production work to companies in NYS specializing in post-production work.

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"Qualified Post Production Costs" means post production costs only to the extent such costs are attributable to the use of tangible property or the performance of services within New York State directly and predominantly in the post production of a qualified film. For the purpose of this definition, attributable to the use of tangible property or the performance of services within New York State shall only include costs and their pro rata portions which are incurred directly in New York State.

The Qualified Post-Production Costs incurred at qualified facilities in NYS must EITHER meet or exceed:

- 75 percent of the total Qualified Post-Production costs paid or incurred in the post-production of the film at any post-production facilities; OR
- $1 million

An additional 5% credit may be available in the Post-Production Program for costs incurred in Upstate NY, outside the Metropolitan Commuter Transportation District (MCTD). The MCTD includes New York City, Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester counties.

The application process commences with an online initial application submitted prior to incurring any qualified costs in NYS. Once the initial application is deemed complete, the applicant is eligible to file a final application based on actual project information. After review of the final application a Certificate of Tax Credit may be issued.

C. INDEPENDENT FILM PRODUCTION TAX CREDIT

In the New York State Independent Film Production Tax Credit Program, productions which comply with certain requirements may be eligible for a tax credit of 30% of qualified production costs. This tax credit is funded at $100 million per calendar year. This is a separate program from the Production Tax Credit Program and is available for qualified independent film production companies. A specific film production can only participate in one program. If an application to the New York State Independent Film Production Tax Credit Program is not accepted due to limited availability of funds, the applicant may apply to the NYS Film Production Tax Credit program.

The program is limited to qualified independent film production companies which are independently owned and operated and no more than 50% owned by a publicly-trade entity. This program is also limited to feature films, television series, relocated television series, and films for television.

A film production company cannot claim the New York State Independent Film Production Tax Credit Program and the post-production credit for the same project.

"Qualified Production Costs" has the same definition as used in the Production Tax Credit Program with the addition of post-production costs such as film editing, sound design and effects, and visual effects.

Eligibility requirements vary depending upon size of project budget, location of photography and number of photography days at certain locations.

There are at least two applications windows per year for applications to be accepted. Each applicant is limited to two applications per year. Applications are accepted on a first-come, first-served basis during the window openings based upon the initial application's Docusign date.

Applicants select a pool based on total qualified costs. Pool 1 with approximately $20 million annually is for productions with $10 million or less in qualified costs. Pool 2 with approximately $80 million annually is for productions with more than $10 million in qualified costs. There is no maximum budget, however each application's total qualified costs excluding labor cannot exceed $60 million for the purposes of the tax credit.

Applicants must begin principal and ongoing photography within 180 days from the submission of the initial application. After the application window closes, the applicant will be notified of their acceptance to the program. When the applicant completes the project through post-production, a final application must be submitted with actual project information. After the review and approval is complete, a Certificate of Tax Credit will be issued to the applicant.

Please see more information at Empire State Development's website:
https://esd.ny.gov/new-york-state-independent-film-production-tax-credit-program#objective

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TAX CREDITS FOR EMERGING TECHNOLOGY COMPANIES

BY ROBERT G. MURRAY AND ROBERT J. RYAN

In 1998, New York State enacted new legislation providing for the Qualified Emerging Technology Company ("QETC") Tax Credit and for the Qualified Emerging Technology ("QETC") Capital Tax Credit.[90] The intent behind this legislation was to encourage economic growth, create jobs and keep the technology businesses in New York State competitive.

The QETC Tax Credit and the QETC Capital Tax Credit have been available to Article 9-A taxpayers (business corporations) since tax years beginning on or after January 1, 1999, and for Article 22 taxpayers (that is, individuals, including sole proprietors, partners of partnerships, shareholders of New York S corporations, members of a limited liability company (LLC), beneficiaries of estates and trusts, and estates and trust) since tax years beginning on or after January 1, 2000. The Facilities, Operations and Training Credit was available for tax years beginning on or after January 1, 2005, for both Article 9-A and Article 22 taxpayers.

A QETC is, as defined in § 3102-e of the Public Authorities Law ("PAL"), a company located in New York State that has total annual product sales of $10 million or less and meets either of the following criteria: (i) its primary products or services are classified as emerging technologies under § 3102–e(1)(b) of the PAL; or (ii) it has research and development facilities in New York State and its ratio of research and development funds to net sales equals or exceeds the average ratio for all surveyed companies classified (as determined by the National Science Foundation (NSF) in the most recently published results from its survey, Research and Development in Industry:1998, or a comparable successor survey as determined by the New York State Department of Taxation and Finance). Taxpayers can consult the most current version of form DTF-620-I, Application for Certification of a Qualified Emerging Technology Company, to obtain current ratios in effect.

[90] Subsequently, in 2005, the legislation was amended to include the Qualified Emerging Technology Company (QETC) Facilities, Operations and Training Credit. This credit has since expired.

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A. QETC EMPLOYMENT CREDIT

A refundable credit of $1,000 per new full-time employee[91] (defined as employees in excess of 100% of base-year[92] employment level) is available for three consecutive years to eligible taxpayers, provided that eligibility requirements continue to be met.

Any amount of the credit not deductible in the current tax year may be carried over to the next tax year, or in lieu of a carryover, a taxpayer that qualifies as the owner of a new QETC business or as a new QETC business may elect to have the carryover refunded. In no case can the credit and the carryover of the credit deducted for the tax year reduce the tax to an amount less than the tax due on the minimum taxable income base or the fixed dollar minimum, whichever is higher; neither is the credit allowed against the metropolitan business tax surcharge.

B. QETC CAPITAL TAX CREDIT

There are two QETC capital tax credits available:

(a) The first is a 10% tax credit on all qualified investments, providing the taxpayer certifies to the Commissioner of Taxation and Finance[93] that the qualified investment will not be sold, transferred, traded or disposed of during the four years following the year in which the credit is first claimed.

(b) The second is a 20% tax credit on qualified investments provided the taxpayer certifies to the Commissioner of Taxation and Finance that the qualified investment will not be sold, transferred, traded or disposed of during the nine years following the year in which the credit is first claimed.

The total amount of credit allowable to a taxpayer for all years may not exceed $150,000 for a credit computed at the rate of 10% of qualified investments, and $300,000 for a credit computed at the rate of 20% of qualified investments. Other special limitations apply to investments made by a married couple or an estate or trust.

The Capital Tax Credits are only available to an owner-taxpayer at the start of an emerging technology business. Otherwise, any qualified investment made afterwards must not be made by, or on behalf of, an owner (defined as any entity that owns more than a 10% interest in the QETC). Qualified investments do not include investments made by, or on behalf of, an owner of the qualified emerging technology company, including, but not limited to, a stockholder, partner, sole proprietor or any related person as defined in § 465(b)(3)(C) of the Code.

The QETC Capital Credit is not refundable, but any amount of the credit not deductible in the current tax year may be carried over for an unlimited number of tax years. An additional provision exists which allows for the recapture of a pro-rata share of the credit in an event the qualified business is not held for the requisite period.

C. QETC FACILITIES, OPERATIONS AND TRAINING CREDIT

The 2005/06 New York State Budget enacted a new, refundable credit for eligible qualified emerging technology companies (either Article 9-A or Article 22), based on qualifying expenditures in research and development and training for tax years beginning on or after January 1, 2005. The maximum total dollar amount of the credit that may be claimed in any one year is $250,000. The credit is refundable and may be used for up to four consecutive years with the option for a fifth year if a qualified taxpayer is relocating from an academic incubator facility. In that case, the taxpayer may elect to defer the credit to the first tax year after the relocation. For corporate taxpayers, the credit can reduce tax to the higher of the AMT or fixed dollar minimum. This credit expired in 2011.

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[91] Full-time employment means a job consisting of at least 35 hours per week, or two or more jobs that together constitute the equivalent of a job of at least 35 hours per week. A seasonal job that meets these requirements constitutes full-time employment if the job is continuous for at least three months.

[92] Base-year employment is defined as the average number of individuals employed full-time by the taxpayer in New York State during the three taxable years immediately preceding the first taxable year in which the credit is claimed. In those situations where the taxpayer provided full-time employment within the State during only a portion of the three year period, then the first effective date for the company to take advantage of this credit will be the next year following the first full taxable year that the company had full-time employment in New York State.

[93] To be certified, QETC must annually apply to the NYS Tax Department (Form DTF-620). If the QETC is not certified by the Commissioner of Tax and Finance, taxpayers who make a qualified investment will not be able to claim the QETC capital tax credit.

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HISTORIC REHABILITATION TAX CREDIT ("HRTC")

BY SHAWN M. GRIFFIN AND ROBERT J. RYAN

On July 29, 2009, Governor Paterson signed into law the Historic Rehabilitation Tax Credit ("HRTC"), which expands the scope of the existing New York State tax credit for the rehabilitation of historic properties. Under prior law, for rehabilitated certified historic buildings placed in service on or after January 1, 2007, owners may receive a State tax credit equal to 30 percent of the allowable 20% Federal tax credit (or a 6% State credit), with a cap of $100,000 for commercial projects and a cap of $25,000 for residential projects. Because the Federal tax credit is 20 percent of qualified rehabilitation expenditures, this effectively results in a State tax credit of 6% of qualified rehabilitation expenditures.

Now, the allowable amount of the state HRTC is $5 million for commercial projects (including non-residential projects and residential rental projects) and to $50,000 for residential projects (i.e., certified historic buildings used as owners' residences). Under the current State HRTC, commercial owners approved to receive the federal historic rehabilitation tax credit may receive an additional State tax credit equal to the full amount of the Federal tax credit, 20-30 percent of the qualified rehabilitation expenditures on the rehabilitation of certified historic structures which are located in qualified census tracts or on NY State parkland.[94] Qualified rehabilitation expenditures include amounts properly chargeable to a capital account with respect to which straight-line depreciation is used, but do not include amounts expended for the acquisition or enlargement of a building. A certified rehabilitation is any rehabilitation certified by the Secretary of the Interior as being consistent with the historic character of the building or district in which the building is located. A certified historic structure is any building which is either (1) listed in the National Register of historic buildings or (2) is located in a registered historic district and is certified by the Secretary of the Interior as being of historical significance to the district.

To qualify for the 30 percent credit, the building must have been placed in service after January 1, 2022 and the total QRE cannot exceed $2,500,000. Any unused credits from rehabilitated historic properties placed in service on or after January 1, 2015 are carried forward indefinitely. Additionally, for tax years beginning on January 1, 2026, the State tax credit may be transferred to other taxpayers. The HRTC in its current iteration expires on December 31, 2029.

[94] Eligible census tract data is updated April 1 of each year.

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RECHARGE NEW YORK (RNY) POWER PROGRAM

BY ROBERT J. RYAN

The ReCharge New York Program is administered by the New York Power Authority (NYPA) and was signed into law on April 14, 2011. This new program replaced the former "Power for Jobs" Program and the "Energy Cost Savings Benefit" Program. The first allocations under ReCharge were made on April 12, 2012. The program is designed to retain and create jobs through allocations of low-cost power. The ReCharge program has a block of 910 Megawatts (MW) of electric power to allocate (50% NYPA hydropower/50% market power procured by NYPA). Applications are available online through the New York State Consolidated Funding Application (CFA). In order to be considered for an allocation of RNY Power, applications must be submitted through the CFA process. You can access the CFA at http://nyworks.ny.gov. As part of the application process, you must submit your electric invoices for all accounts in which you are applying for a power allocation. Applications are reviewed by the Economic Development Power Allocation Board, which makes recommendations and referrals to the NYPA trustees for final approval. ReCharge power allocations can be for up to seven years. For-profit and not-for-profits qualify, but all retail businesses, sports venues, gaming or entertainment-related establishments, and places of overnight accommodation are categorically excluded

Successful applicants can make a one-time election when going to contract with NYPA to have the 50% market power of their allocation purchased by NYPA or by customer-arranged market power purchases. NYPA will bill the customer for the cost of the power and the associated NYISO charges. The local utility will still bill the customer for delivery of the power and energy. Each local utility will need to file and have approved tariffs with the New York Public Service Commission ("PSC"). As such, actual savings will be different region by region based on your local utility provider. The PSC has authorized discounted tariffs. Given that the power and energy portions of the bill have at least 50% NYPA hydropower rates, and pressure will be on the utilities to deliver under discounted tariffs, there should be savings for these customers. However, the extent of the savings will vary by customer account and region. Therefore, efforts to make generalized statements or estimates as to how much is saved under this program should be avoided.

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LINKED DEPOSIT PROGRAM

BY ROBERT J. RYAN

The Linked Deposit Program is a public-private partnership with area banks that provides affordable capital to eligible businesses at reduced interest rates, which are offset by corresponding "linked" State deposits at the bank.

ELIGIBLE BUSINESSES:

Manufacturing firms with principal place of business in NYS and 500 or fewer full-time NYS employees.

Services businesses with a principal place of business in NYS and 100 or fewer full-time NYS employment; independently owned and operated; not dominant in its field; and project must result in the retention or creation of permanent jobs in NYS.

Agricultural businesses with a principal place of business in NYS and 500 or fewer full time NYS employees.

Any firm with a principal place of business in NYS that employs 100 or fewer full-time NYS employees seeking financing through the LDP for an export project.

Qualifying technology and innovation businesses with 100 or fewer full-time NYS employees.

Businesses with a principal place of business in NYS located in a highly distressed census tract with 100 or fewer full-time employees and not retail, unless receives a determination by ESD.

Certified Minority or Women-owned Business Enterprises (MWBE's) with a principal place of business in NYS that need financing to fulfill a NYS or Federal procurement contract.

Note: Start-up businesses and professional services such as health, legal, accounting, engineering or architectural services are not eligible, as well as personal services companies (daycares, funeral homes).

ELIGIBLE PROJECTS:

- Export projects designed to increase a firm's export activities.
- Working capital in support of activities that help to improve productivity and competitiveness.
- Modernization of equipment or facility.
- Introduction of advanced technology to improve productivity and quality.
- Improvements in production processes and operations.
- Introduction of computerized information, reporting and control systems.
- Development and introduction of new products.
- Identification and development of new markets.
- Buyouts of viable companies by employees or local owners residing in NYS.

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BENEFITS:

The Program provides a 2% 3% savings on the prevailing interest rate for “Linked Loans” up to $4 million for four years. The lifetime maximum per eligible business for "Linked Loans" is $6 million. An eligible business can have an unlimited number of "Linked Loans" outstanding at any one time provided they do not total more than $6 million.

The 2% interest rate reduction is for eligible manufacturers and service firms.

The 3% interest rate reduction applies to all other qualified businesses (other than eligible manufacturers and service firms) as listed above.

Note: A Linked Deposit loan can have a maturity of more than four years; however, the interest rate subsidy will be for only four years unless renewed for another four-year period. The borrower may request a four-year extension provided they have lifetime eligibility remaining and have met the goals set in the original application and will create additional benefits within the next four-year period.

APPLICATION:

Applications are available from Empire State Development and participating lenders. Businesses apply at a participating lender, which will complete the lender’s section of the Linked Deposit application and send it to Empire State Development for approval. The Linked Deposit application must contain an "Impede" Statement that the project would be impeded if the borrower does not receive the assistance (i.e. project delayed, cancelled, etc.). Loan rates are set by the lender and accessing the Linked Deposit program does not enhance credit worthiness.

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NEW YORK STATE ENVIRONMENTAL QUALITY REVIEW ACT "SEQRA" OR "SEQR"

BY SHAWN M. GRIFFIN AND ANTHONY P. LUISI

Most actions taken by public and quasi-public agencies, including IDAs, URAs, LDCs and State agencies, are subject to the New York State Environmental Quality Review Act ("SEQRA" or "SEQR"). (See Appendix C, attached hereto for excerpts from SEQRA.) Before an agency can undertake or approve an "action" or provide financial or other benefits, it must comply with SEQRA or make a determination that the action is exempt from SEQRA as a Type II Action. A project can consist of a series of activities or steps, all of which together are reviewed as one "action" for purposes of SEQRA. If the project constitutes a Type II Action, the agency identifies it as such and no further action is required under SEQRA before proceeding (these projects typically consist of equipment purchases, replacements, internal build-outs and refinancings with no new construction, or other small projects with no environmental impact, and may also consist of projects for which the environmental impact review is preempted or precluded by other state laws, such as the Public Service Law for major electric generation or transmission facilities).

If an agency concludes that the action is not a Type II Action, the agency must then determine if the project constitutes a Type I Action (typically a larger project involving significant land acreage and construction work) or an Unlisted Action, which are all actions not identified as a Type I or Type II Action (the majority of projects will fall within this category). (See Appendix C, attached hereto for definitions.)

SEQRA requires agencies to carry out its terms and requirements with minimum procedural and administrative delay and attempts to minimize the burdens of compliance by encouraging agencies and other involved agencies to designate a "lead agency." When a lead agency is used, the review is referred to as a "coordinated review," which is the process by which all "involved" agencies—agencies making a discretionary decision with respect to the project— undertake one integrated environmental review. Such a procedure minimizes the prospect that different involved agencies will undertake conflicting environmental reviews of the same project. A coordinated review is required for a Type I Action and is optional for an Unlisted Action. An uncoordinated review of the action may also be conducted for Unlisted Actions, which is the process by which involved agencies independently review impacts of a project. Any involved agency, including an IDA, can act as the lead agency.

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SEQRA generally requires the agency desiring to act as lead agency to give 30 days' written notice to all other involved agencies of its intent and to proceed thereafter if receiving no objection from the other involved agencies. If an objection is received, SEQRA has a procedure for resolving the dispute as to which agency shall act as the lead agency. Another method for determining the lead agency is to have each involved agency send a written letter to the proposed lead agency indicating that they consent to that entity acting as the lead agency. When adopted and used by all involved agencies, this procedure can expedite the typical 30-day waiting period after sending out notice of an intent to act as the lead agency.

If the project constitutes a Type I Action or an Unlisted Action, an environmental assessment form (EAF) must be prepared by the agency or project sponsor (where an IDA is involved, the company may prepare the form and submit it to the agency). A full (long) environmental assessment form must be used if the project is a Type I Action. A short or full environmental assessment form may be used if the project constitutes an Unlisted Action. An uncoordinated review of the action may also be conducted for Unlisted Actions. Before proceeding with a Type I Action or an Unlisted Action, the agency must review Part 1 of the EAF, complete Part 2 and Part 3 (if necessary) of the EAF and determine whether or not an environmental impact statement (EIS) is required according to the procedures set forth in SEQRA. If the agency concludes that the project will not have any potentially significant adverse impacts on the environment and therefore an EIS is not required, the agency will proceed by issuing a "Negative Declaration." On the other hand, if the agency concludes that an EIS is required because the project will include the potential for one or more significant adverse impacts on the environment, then the agency will proceed by issuing a "Positive Declaration" and require the scoping and preparation of a draft EIS, as explained below.

SEQRA was drafted to accommodate all types of projects. For example, a project constitutes a Type II Action when the agency is assisting a company with an equipment acquisition. Once the project is identified as a Type II Action, the action is exempt from SEQRA and the agency may act without delay. When the agency is involved with the development of a project involving the physical alteration of less than 10 acres or the acquisition or lease of less than 100 acres, the project will generally constitute an Unlisted Action. With an Unlisted Action, an agency can make a Negative Declaration if, after completing Part 2 and Part 3 (if necessary) of either the long full or short EAF, the agency finds that the action does not include the potential for a significant adverse environmental impact. If the project involves the physical alteration of 10 or more acres, the acquisition or leasing of more than 100 acres, or the construction of new residential units that meet or exceed certain regulatory thresholds, the project will constitute a Type I Action and the agency is required to use the full EAF form in making its initial determination of significance. If, upon completing Part 2 and Part 3 (if necessary) of the full EAF, the agency has issued a Negative Declaration, no further actions are required under SEQRA.

If the agency determines that the action includes the potential for at least one significant adverse environmental impact and therefore issues a "Positive Declaration," for a Type I Action or Unlisted Action, the project will be required to complete an EIS. The issues to be addressed in the EIS will be established by a scoping procedure and the issues will be addressed according to the procedures and timeframes set forth in SEQRA. These procedures involve public notices and opportunities for public comment that should be rigorously adhered to.

Where an EIS is determined to be required, the next step is the scoping process, the intent of which is to focus the EIS only on potentially significant adverse environmental impacts and to eliminate consideration of potential impacts that are not relevant or not significant. The project sponsor must submit a draft scope, which is then subject to an opportunity for public participation. The lead agency then provides a final written scope to the project sponsor within 60 days after its receipt of the draft scope. All relevant issues should be raised before the issuance of the final written scope. If the lead agency fails to provide a final written scope within such 60 days, then the project sponsor is permitted to prepare and submit a draft EIS consistent with its draft scope. Otherwise, the project sponsor or the lead agency (at the project sponsor's option) will prepare a draft EIS that is consistent with the final written scope and that addresses relevant and material facts, analyzes significant adverse environmental impacts from the project, and evaluates all reasonable alternatives and mitigation measures. There is no mandatory format for an EIS, but any draft EIS must contain certain elements required under SEQRA. The draft EIS is then subject to an additional opportunity for public participation.

After considering all public comments received on the draft EIS, including comments from the project sponsor, the lead agency must afford

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other involved agencies and the public a reasonable period of time, not less than 10 calendar days, to consider the final EIS before the lead agency issues its written findings statement. The lead agency's filing of a written findings statement and final decision on the proposed action must be made within 30 calendar days after the filing of the final EIS. Findings must consider the relevant environmental impacts from the proposed project, weigh and balance relevant environmental impacts with social, economic and other considerations, provide a rationale for the agency's decision, certify that the requirements of SEQRA have been met and certify that the proposed project avoids or minimizes adverse environmental impacts to the maximum extent practicable.

Additional SEQRA procedures and requirements may apply to projects located in certain sensitive areas, such as coastal areas, and certain types of projects in communities that are designated as "disadvantaged" by New York State.

Agencies should work closely with their counsel when taking actions under SEQRA. SEQRA provides fertile ground for opponents to slow or disrupt a project, whether during the permitting process or through litigation.

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OPEN MEETINGS LAW; FOIL

BY SHAWN M. GRIFFIN

Public agencies (including some LDCs, as detailed within the Local Agencies and Incentives section above, and as further detailed herein) must hold their meetings in compliance with the Open Meetings Law. (*See* Appendix D hereof for excerpts from the Open Meetings Law, including the limited circumstances under which an agency can go into executive session and exclude the public from its deliberations.) An agency should be aware that any time a quorum of its members is discussing agency business, the body is subject to the Open Meetings Law. This would include inadvertent gatherings where a quorum is present and agency business is being discussed. In addition, the Open Meetings Committee has said that the Open Meetings Law does not permit a member of a public body to participate in a meeting via telephone conference call or through the use of e-mail. *cf.* N.Y. Pub. Off. § 102 (stating a member of a public body may participate in a meeting via video conference); *see* Appendix D; *see also* OML § 103-a (allowing a public body to use videoconferencing to conduct meetings).

Records of public agencies (including some LDCs, as detailed within the Local Agencies and Incentives section above, and as further detailed herein) are subject to public inspection under the Freedom of Information Law ("FOIL"). (*See* Appendix E hereto.) These records include the application and related materials submitted by a company to an agency. The company should be advised to separately identify proprietary and/or information that the company does not want disclosed publicly. The agency should appoint a records officer who will maintain the records and respond to requests for information from the public. In addition, the agency should designate an appeals officer or panel to address appeals made by parties denied access to records by the records officer.

By statute, § 102 of the Open Meetings Law defines "public body" as "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 of such public body."

However, an entity may fall outside the scope of this definition if its sole purpose is advisory in nature. Specifically, an entity whose sole function is advisory, with no power to implement its recommendations by making laws, adopting regulations or directing changes in law or policy, is not a public body performing a governmental function that is subject to the Open Meetings Law. *Poughkeepsie Newspaper Div. of Gannett Satellite Info. Network v. Mayor's Intergovernmental Task Force on New York City Water Supply Needs,* 145 A.D.2d 65 (2d Dep't 1989).

Nonetheless, the mere attachment of the label "advisory" to a body or committee is insufficient to circumvent FOIL or the Open Meetings Law. The Third Department held that various criteria or benchmarks are material in such an analysis, including: (i) the authority under which the entity was created, (ii) the power distribution or sharing model under which it exists, (iii) the nature of its role, (iv) the power it possesses and under which it purports to act, and (v) a realistic appraisal of its functional relationship to affected parties and constituencies. *See Snyder v. Third Dep't. Judicial*

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Screening Comm.,18 A.D.3d 1100 (3d Dep't 2005), *lv. denied* 837 N.E.2d 734 (2005).

In S*mith v. City University of New York*, 708 N.E.2d 983 (1999), the Court addressed the issue of whether an entity was advisory and exempt from the Open Meetings Law. The Court held that an association comprised of administrators, faculty members and students at a community college authorized to review proposed budgets, allocate student activity fees and disbursements, constituted a "public body" subject to the Open Meetings Law. The Court reasoned that the association performed "substantially more than an advisory function," having "decision-making authority to implement its own initiatives."

The issue of whether an LDC is subject to the provisions of the Open Meetings Law was addressed in the case of *Canandaigua Messenger, Inc. v. Wharmby,* Supreme Court, Ontario County, May 11, 2001, *aff'd* 292 A.D.2d 835 (4th Dep't 2002) (analyzing the status of the Canandaigua Recreation Development Corporation (an entity formed under §1411 of the Not-for-Profit Corporation Law) under the Open Meetings Law). For purposes of the Open Meetings Law, citing *Smith v. CUNY (see above)*, the lower court in Canandaigua found that the entity was not advisory and had "officially established duties and organizational attributes of a substantive nature which fulfill[ed] a governmental function for public benefit." The mere fact that the entity was labelled a not-for-profit corporation was not determinative in the court's analysis. Rather, the court paid particular attention to the following facts: (i) the LDC's bonds were issued on behalf of the City, (ii) the LDC's board members were appointed by the City, and (iii) the City had "an option to purchase the property at any time while the bonds [were] outstanding and w[ould] ultimately take a fee title to the property." The court concluded that the entity was performing a function "in place of the City" and therefore was an agency subject to the Open Meetings Law. *Id*. The Appellate Division, Fourth Department, affirmed the substance of holding, but found that the lower court abused its discretion in awarding attorney's fees.

Because LDCs are quasi-governmental in nature and often exist to lessen the burdens of government, the composition of the LDC's board of directors can also subject it to FOIL requirements. In *Matter of Buffalo News v. Buffalo Enter. Dev. Corp.*, 84 N.Y.2d 488 (1994), the court held that the Buffalo Enterprise Development Corporation was subject to both the Open Meetings Law and FOIL, due to the fact it had a board made-up of public officers and engaged in activities suggesting it was an agent of the municipality. In contrast, the Saratoga Economic Development Corporation was found to be exempt from FOIL because its board was comprised of "private businessmen" and it simply contracted with the municipality on a "fee-for-service" basis. *See Matter of Farms First v. Saratoga Econ. Dev. Corp.,* 222 A.D.2d 861 (3d Dep't 1999).

In conclusion, the determination of whether an LDC falls under the purview of the Open Meetings Law or FOIL must be reviewed on a case-by-case basis in light of the factors mentioned above. Based upon current precedent, LDC bond issuers will likely be subject to Open Meetings Law and FOIL requirements, while the fate of non-issuing LDCs is less certain.

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START-UP NY

BY ROBERT J. RYAN

NOTE: The START-UP NY Program is closed to new applicants after December 31, 2025 unless otherwise extended through legislation.

On June 24, 2013, Governor Andrew Cuomo signed into law the SUNY Tax-Free Areas to Revitalize and Transform Upstate New York Plan ("START-UP NY"). The intent behind START-UP NY is "to promote entrepreneurialism and job creation by transforming public higher education." To effectuate this goal, START-UP NY provides tax exemptions to businesses as an incentive to bring new ventures to New York State with a focus on revitalizing the upstate region.

A. WHERE IS START-UP NY APPLICABLE?

The focus of START-UP NY is on the upstate region (areas North of Westchester). A business chosen to participate in START-UP NY ("Participating Business") must be located on the site of: (i) a public university; (ii) a private university; or (iii) one of the State properties "strategically" designated as tax-free communities.

Public colleges and universities ("SUNY") north of Westchester County ("Upstate") may create "tax-free communities" using vacant land and space in existing buildings on SUNY campuses, up to 200,000 square feet within one mile of campus, and any business incubator with a bona fide affiliation to the campus. While public colleges in the City of New York ("CUNY") may create "tax-free communities," only five CUNY schools may create "tax-free communities" (one in each borough).

Private colleges and universities Upstate are allotted 3 million square feet of tax-free areas to be created into "tax-free communities." The square footage is allocated by a program board made up of three members appointed by the governor, the Speaker of the Assembly, and the Temporary President of the Senate.

Each downstate area (Nassau, Suffolk and Westchester counties, Brooklyn, the Bronx, Manhattan, Queens and Staten Island) is allocated 75,000 square feet to be created into "tax-free communities." However, downstate areas may be eligible to receive additional space if the cap is reached at all locations.

START-UP NY also designates approximately 20 properties as "tax-free communities." Such properties are state-owned vacant land, vacant facilities, o facilities in the process of closing and becoming vacant.

B. WHO IS ELIGIBLE?

A business eligible to participate in START-UP NY ("Eligible Business") must be: (i) a "new business;" (ii) a company from out-of-state that is relocating into New York State; or (iii) an existing New York State business planning an expansion.

To qualify as a "new business," an Eligible Business must not be operating or located within New York State at the time it submits its application for the program and must not be merely moving existing jobs into the tax-free area from another area in the state. Furthermore, it must not be "substantially similar" in operation or in ownership to a business that was taxable in New York State anytime within the past five years.

To qualify as an existing New York State business planning an expansion, an Eligible Business must demonstrate that it will create new jobs in the area and that it has not eliminated any jobs in the state (i.e., a company creating a new line of business or a company opening a new advanced manufacturing facility).

Several businesses are categorically excluded from START-UP NY ("Ineligible Businesses"). Ineligible Businesses include: (i) restaurants; (ii) law firms; (iii) medical and dental practices; (iv) hospitality

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businesses (i.e., hotels); (v) finance and financial services companies; (vi) businesses providing personal services; (vii) accounting firms; (viii) utility, electricity and national gas providers; and (ix) businesses providing business or administrative support services unless such business can demonstrate that it would create no fewer than 100 jobs. As a general rule, no applicant will be approved if its operation would compete with other local businesses in the community outside of the "tax-free community." Furthermore, businesses participating in the limited space available in the downstate area (mentioned above) must be in the high-tech business.

All Eligible Businesses must meet/comply with the following general requirements:

- Demonstrate that its mission and activities align with or further the academic mission of the campus sponsoring the area in which it would be located; and
- Demonstrate that its participation in the program will have positive community and economic benefits; and
- Obtain a plan/report from the college or university in which it plans to locate that designates the space or location that would host the Eligible Business and how the business would satisfy these requirements; and
- File an annual report after each year of operation in which it received tax benefits (which will be available for public review); and
- Demonstrate that it is in compliance with all applicable laws, including, but not limited to, prevailing wage requirements under the Labor Law; and
- Demonstrate that it complies with the Minority and Women-Owned Business Enterprise objectives.

C. HOW DOES THE APPLICATION PROCESS WORK?

Step 1: A sponsoring educational institution submits a plan for the designation of a "tax-free community" to Empire State Development ("ESD"). The educational institution must provide notice and a copy of the plan at least 30 days prior to submission.

Step 2: The Commissioner of Economic Development ("Commissioner") approves the plan submitted by a public educational institution. The START-UP NY Approval Board approves the plan submitted by private educational institution.

Step 3: The business applies to the educational institution for sponsorship.

Step 4: The educational institution submits an application and all supporting materials to the Commissioner

Step 5: The Commissioner accepts or rejects the application within 60 days

Step 6 (if approved): The business must submit an annual report (as described above)

D. WHAT ARE THE TAX BENEFITS?

A Participating Business will receive the following tax benefits for the first 10 years of operation:

- Exemption from business and corporate taxes, property tax, income tax and sales tax paid on the Participating Business' purchases of tangible personal property and services for their locations within the tax-free areas;
- Exemption from organization tax and license maintenance fees
- If business is operating within the Metropolitan Commuter Transportation District ("MCTD") and is engaged in business with the MCTD, the Participating Business' payroll expense will be exempt from the MCTD

In addition to the tax benefits received by a Participating Business, employees of a Participating Business will receive the following tax benefits:

- Years 1-5: 100% of income earned is tax exempt
- Years 5-10: Exempt from income tax on income up to $200,000 for individuals, $250,000 for heads of household, and $300,000 for taxpayers filing a joint return.

It should be noted that START-UP NY limits the number of new jobs eligible for this income tax exemption at 10,000 per year.

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NEW YORK STATE AND NATIONAL GAMING & HOSPITALITY DEVELOPMENT AND FINANCE PRACTICE

BY SHAWN M. GRIFFIN

A. NATIONAL GAMING AND HOSPITALITY PRACTICE

Shawn Griffin chairs our Hospitality and Gaming Industry team. In addition to assisting our brick-and-mortar casino (tribal and commercial) and video lottery and online gaming operators with regulatory and licensing matters, Harris Beach Murtha attorneys have vast experience in gaming finance and our experience in New York State is second to none. Our team has been involved for 30 years in the evolution of gaming and entertainment in New York. Our attorneys have been involved in (1) the development and financings for del Lago Resort & Casino, (2) development, financings (tax exempt and non-tax exempt), strategic planning and New York State Compact negotiations for the Seneca Nation of Indians and the Seneca Gaming Corporation, (3) development, acquisitions (brick and mortar and online), financings and strategic planning for the Delaware North Companies Gaming & Entertainment subsidiary, (4) development, and financings for Yonkers Raceway (Empire City Casino), (5) financing at Resorts World Catskills, (7) the acquisition and related financing for Suffolk Regional OTB's purchase of the land and improvements of Jake's 58 Casino Hotel and related buy-out of the Delaware North management agreement and (8) the acquisition of the Batavia Downs Hotel by and tax exempt borrowing by Western Regional OTB.

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Harris Beach Murtha has unique experience with NYS OTB operators, VLT operators, Indian Nation operators and the new commercial casinos in New York. Our attorneys have experience with both gaming borrowers and lenders who provide financing in the gaming space, and thus, are able to connect the dots to facilitate traditional and alternative lending structures.

B. NEW YORK CASINO LICENSING

Effective February 1, 2013, Chapter 60 of the Laws of 2012 merged the New York State Racing and Wagering Board with the New York State Division of Lottery, creating a single State agency, the New York State Gaming Commission (the "Commission"), which was granted broad oversight and regulatory powers over legal gaming destination gaming facilities. In July 2013, the legislature enacted Chapter 174 of the Laws of 2013, the Upstate New York Gaming Economic Development Act of 2013 (the "Casino Bill"), and Chapter 175 of the Laws of 2013 (amending Chapter 174). The Casino Bill amended the Racing, Pari-Mutuel Wagering and Breeding Law ("PML"), and authorized the creation and issuance of licenses for four of the seven facilities permitted by the constitutional amendment. Chapter 174 established the Gaming Facility Location Board (the "Board") to review and recommend applications to the Commission for ultimate licensure. The Casino Bill also introduced amendments to the tax law, executive law, Indian law and penal code.

The first four licenses were geographically restricted to Upstate New York, while the remaining three licenses were set aside for award, if authorized by the legislature, not sooner than 10 years after the four upstate licenses were awarded. The first licensure process was focused on relieving unemployment and economic distress in rural upstate regions. Three of the four initial licenses were awarded in 2015, and the fourth in 2016 to: (i) del Lago Resort and Casino (Seneca County); (ii) Resorts World Catskills (Sullivan County); (iii) Rivers Casino and Resort at Mohawk Harbor (Schenectady County); and (iv) Tioga Downs Casino, Racing & Entertainment (Tioga County).

In April of 2022, the Governor signed Chapter 56 of the Laws of 2022 into law (the "2022 Casino Bill"), accelerating the award of the three final casino licenses, and introducing new, more extensive eligibility requirements, most significantly introduction of Community Advisory Committees (the "CACs"). CACs were to review each application for a casino site within that CAC's geographical purview and determine whether there is public support for the facility in the proposed host community, emphasizing the focus on community benefits and job opportunities in the host region.

The 2022 Casino Bill focused eligibility for the licenses on how the applicant proposes to advance a series of social and economic objectives, with consideration given to whether the applicant would be converting an existing video lottery gaming facility versus whether the facility will be a new gaming site, and to the particulars of the proposed site, including the site's ability to obtain necessary zoning changes to implement the project. Factors include maximizing revenue, the caliber of the proposed facility, reasonable and feasible construction schedules, impact mitigation on host and nearby municipalities and local businesses, green building design, promoting the development of a skilled and diverse workforce and employee access to additional resources, such as on-site daycare. The Board conducted an analysis of the revenue impact of each applicant's proposed gaming facility on existing facilities and potential new facilities. CAC approval, completion of local zoning and land processes, and completion of the required State Environmental Quality Review Act process were all pre-requisite to application review by the Board.

In December of 2025, the Board selected three (3) of the eight (8) applications it received to apply to the Commission. Shortly after, the Commission awarded the three remaining conditional commercial gaming licenses to: (i) Bally's Bronx; (Ferry Point, the Bronx); (ii) Hard Rock Metropolitan Park (Willets Point, Queens); and (iii) Resorts World New York City (Aqueduct, Queens). The newly awarded licenses are conditioned on meeting community benefit commitments and subject to third-party monitoring for five (5) years.

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LOCAL GOVERNMENT'S ROLE IN ECONOMIC DEVELOPMENT

BY SHAWN M. GRIFFIN, JEFFREY E. STORCH AND CHRIS A. ANDREUCCI

Local governments can be an integral part of economic development in New York State. New projects, whether they be residential, healthcare or manufacturing, often require the replacement and repair of municipal facilities and the increase in local government services. Improvements as large as the expansion of water and sewer systems and as small as the reconstruction of sidewalks are often required when new projects are built. As such, it is important that local developers engage local governments during the initial stages of a project to see what assistance is available and how costs can be reduced and benefits gained among the parties.

A. GENERAL OBLIGATION BONDS (GO BONDS)

Although the State Constitution prohibits local governments from giving or loaning any property to or in aid of any individual or private corporation or give or loan its credit to such parties[95], a municipality's power to issue general obligation bonds can still be an important part of any project. New York Local Finance Law allows counties, cities, villages, and towns, power to borrow to finance all types of improvements, including water, sewer, roads, sidewalks, parking, waterways and parks within their municipal borders.

New York GO Bonds are some of the most risk averse and secure investments in the market today. GO Bonds issued by a New York municipality contain a pledge of such issuer's "full faith and credit"[96]. Such pledge requires the municipality to make an annual provision on the payment of principal and interest on any indebtedness issued, and should the municipality fail to make such payments, all taxable real property within the municipality would be subject to the levy of ad valorem taxes to make such payments. In other words, should the municipality not have funds to pay its investors, the local government would be forced to raise taxes on its residents. As such, the risk of default on GO Bonds is extremely low.

B. PRIVATE USE AND HOST BENEFIT AGREEMENTS.

Taxable Bonds. An attractive feature of GO Bonds is that the interest earned by investors is tax-exempt under Section 103 of the Internal Revenue Code of 1986, as amended (the "Code")[97]. As long the bonds are not issued for "private use", to provide "private loans" or are secured by "private payments"[98], interest will remain excludable under the Code. As such, a municipality cannot use such proceeds directly for private development (it must be

[95] NY Const Art VIII § 1 and NY Loc Fin L § 100.00
[96] NY Const VIII § 2 and NY Loc Fin L § 101.00
[97] 26 U.S. Code § 103
[98] 26 U.S. Code § 141

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for the municipality's benefit as a whole) or loan said proceeds to be used by a private developer.

However, local governments also have the power to issue taxable bonds. Unlike tax-exempt bonds, taxable bond proceeds can be used where the purpose is still public but the benefit is mostly to a private entity. Improvements related to water, sewer and electric services are often financed with taxable bonds when they are necessary to assist in development. The financing via a taxable GO Bond of the construction of a sewer main that goes directly from the local sewer treatment plant to a new project can often save developers millions of dollars in project costs.

Host Benefit Agreements. Unlike tax-exempt bonds, taxable bonds can be secured by private payments made to the municipality for the payment of all principal and interest on the bonds. In these situations, while the bonds are still backed by the taxpayers, a developer is basically paying the local government to build a public project on its behalf. Unfortunately, this type of arrangement runs afoul of the New York State Constitution[99]. As noted above, local governments cannot provide their credit to private entities. However, there is an alternative that achieves the same result. Rather than make payments to secure a government's GO Bonds, developers can enter into a Host Benefit Agreement. A Host Benefit Agreement is an agreement between the developer and the local government that outlines the benefits the local government will receive for "hosting" the developer's project to mitigate or offset the need for increased public services resulting from the project or to address any new or increased unavoidable potential impacts from the project to the community. Accordingly, Host Benefit Agreements can be tailored to meet the specific needs of the host community. As part of a Host Benefit Agreement, a developer would make payments (in a lump sum or over a period of years) and/or implement new local programs to offset the necessary municipal improvements or other actions needed as a result of the new project, such as addressing increased traffic impacts to local infrastructure or the need for increased emergency response services or providing assurances for local jobs, affordable housing, or environmental enhancements. However, Host Benefit Agreements should only be entered into when the host municipality payments to be made thereunder are legally enforceable. Typically, Host Benefit Agreements are entered into in conjunction with some type of municipal permit or approval such as a condition to the issuance of site plan approval or zoning change by a Town or Village Board, or as part of a mitigation package in connection with a SEQRA determination or in connection with the approval of a franchise agreement between a municipality and a solid waste management facility or entity, or the siting of gaming facilities within the municipality.

Host Benefit Agreements can be a key factor in reducing developer costs as they allow necessary improvements to be financed at the GO Bond interest rate rather than through private financing. Any amount of money paid by the local developer (as long as not specifically pledged to pay any bonds issued in connection with the project) can be used to offset principal and interest on the GO Bonds issued in connection with the increase in municipal services, thus allowing the developer to receive the necessary public improvements. These payments also lessen the burden on the local taxpayers and reduce the likelihood of a strong opposition to the new project.

C. CONCLUSION

Local developers are often unaware of the many ways that a local government can provide assistance to lower project costs and the use of general obligation bonds and host benefit agreements can be a real game changer. As such, developers should immediately reach out to local officials to discuss entering into a mutual beneficial relationship that would lower project costs and benefit the local community as a whole.

[99] NY Const Art VIII § 1 and NY Loc Fin L § 100.00

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ENVIRONMENTAL, SOCIAL AND GOVERNANCE

BY MARK F. SCHUBER AND ROBERT J. RYAN

Environmental, Social and Governance ("ESG") is a multi-factored approach to business operations with the goal of evaluating corporations and corporate behavior based on varying political and social goals that are external or additional to the traditional goal of companies to maximize shareholder profits and which may involve or seek the influence of third parties and external stakeholders. ESG goals have become relevant to certain investors and many publicly funded projects, and the compliance required may vary according to the investor or requirements of the project. There are rating firms that seek to analyze voluntary reports submitted by companies regarding ESG behavior. Attaining a favorable assessment can be accomplished by complying with municipal and county environmental, anti-discrimination, anti-fraud and a variety of other requirements already governing project development. ESG compliance includes meeting certain disclosure standards, complying with technical guidance and rules, setting recognized or required goals and targets, and then reporting on meeting these goals and standards.

ESG is broken into three categories. Environmental generally refers to how companies assess, mitigate and reduce the environmental impacts resulting from their work on a project. Analyzing potential impacts not only gives agencies and companies an opportunity to brainstorm ways to mitigate the negative impacts and formulate alternatives, but also eases the burden of complying with environmental laws that govern the project. For example, an Industrial Development Agency ("Agency"), in conjunction with an applicant, may prepare an Environmental Impact Statement describing, among other things, the project, environment setting, possible impact on that setting, mitigating steps that can be taken or alternatives for the project. (See § 8-0109 of NY CLS ECL). More specifically, if a project involves a brownfield cleanup, there will need to be a remedial investigation and qualitative exposure assessment to determine existing and potential contamination on water supplies and the intensity/route/duration of potential contaminant exposures that could affect humans, fish and wildlife stemming from the project. (See § 27-1415 of NY CLS ECL).

Social generally refers to how companies manage relationships, not only with employees and customers, but also their suppliers and the community they are situated in. There are a variety of sections of the New York Code Rules and Regulations ("NYCRR") that require contractors to affirmatively state they have complied with equal employment opportunities ("EEO") and provide plans for achieving goals set for the participation of Minority or Women owned Business Entities ("MWBEs"). (See §§ 5 NYCRR 143.2, 142.4). Moreover, the NYCRR contains requirements for the agency to monitor the applicant/contractor compliance with EEO obligations. (See § 5 NYCRR 143.4). New York State expanded its efforts for inclusiveness by putting in place requirements to make good faith

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efforts to involve Service-Disabled Veteran-Owned Businesses. (See Executive Law Article 17-B). The emphasis placed on the inclusion of minority business owners runs concurrently with the objectives of the ESG criteria.

Last, Governance generally refers to the use of audits, transparent decision making, training to support adherence to corporate fiduciary duties and decrease risks of non-compliance with law, and other internal tools to promote ethical, legal, and transparent management of a company. Proper governance of leadership can establish accountability and help deter fraud, rule-breaking, and potential breaches of corporate and board fiduciary duties, which help stabilize the company and promote shareholder value. The General Municipal Law ("GML"), for example, creates a statutory obligation to uphold these good governance principles. First, the GML creates perimeters to ensure that bidding is competitive to deter collusion and fraud, even carrying specific repercussions for those who willfully and knowingly involve themselves in a conspiracy to defraud through a bid or offer for a project. (See NYS GML §103). Conversely, those accepting the bids, are required to adequately advertise the opportunity for a project bid, pursuant to §103 of the GML, before accepting the lowest bid. (See NYS CLS County §408-a).

ESG is an intriguing subject because it alone is not a law, but rather an assessment using a variety of existing laws U.S. companies and agencies, and many foreign companies and agencies, are already required to follow. Fulfilling the requirements set forth in the laws mentioned above and additional governing regulations will put the company and agency in the best position for a successful bid and project development, while simultaneously furthering their ESG objectives and upholding internal principles.

ESG reporting and compliance is an evolving framework that can produce competitive benefits if handled in a manner that supports a company's core business and operations, and which seeks to mitigate risks associated with ESG failures.

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THE COMMERCIAL PROPERTY ASSESSED CLEAN ENERGY PROGRAM

BY ROBERT J. RYAN AND ELIZABETH C. HUGHES

The Commercial Property Assessed Clean Energy ("C-PACE") program provides fixed rate, long term financing for property owners to fund on hundred percent of the costs associated with "renewable energy systems and energy efficiency improvements, related energy audits and renewable energy system feasibility studies" on commercial and certain residential buildings. C-PACE in New York State (the "State") was established by Article 5-L of the General Municipal Law (the "Statute"), which authorizes municipalities to opt in to C-PACE by passing a local law creating a sustainable energy loan program. The Statue directs the New York State Energy Research and Development Authority ("NYSERDA") to oversee C-PACE by promulgating guidance, including certifying and developing criteria to certify energy auditors and contractors to perform feasibility studies, and establishing criteria for and making determinations regarding eligible cost-effective energy improvements and renewable energy systems, and monitoring the installation and performance of improvements funded through C-PACE.

C-PACE loans are available to commercial, industrial, not-for-profit and some multifamily building owners[100] however, individually owned and government owned properties are not eligible. Eligible energy efficiency improvements may be components of the construction of a new building or of the renovation of an existing building, including window or door replacements, heating and cooling system upgrades, or similar cost-effective improvements, as determined by NYSERDA. Household appliances or lighting measures not permanently affixed to the real property are not eligible improvements under C-PACE. Eligible renewable energy systems include energy generating system(s) for electric or thermal energy generation by means of solar thermal, solar photovoltaic, wind, geothermal, anaerobic, fuel cell technologies or any other renewable technology approved by NYSERDA. For eligibility of a project under C-PACE, the Statute requires either an energy audit to deem the energy efficient improvement appropriate, or a feasibility study to deem the renewable energy system feasible.

100 Owner-occupied one- and two-family homes or townhomes are not eligible.

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Financing through C-PACE in New York State is administered on behalf of municipalities through the Energy Improvement Corporation ("EIC"), a local development corporation comprised of participating municipal members.[101] Once a municipality has opted into C-PACE by passing a local law, it may then enter into a municipal agreement authorizing EIC to administer C-PACE on its behalf. Property owners in participating municipalities apply to certified EIC capital providers for C-PACE financing. The property owner and the capital provider then apply directly to EIC for the project to be qualified as C-PACE eligible. The property owner and the capital provider on eligible projects then enter into a finance agreement for the C-PACE loan. EIC records the C-PACE loan as a "Benefit Assessment Lien" against the real property, which is subordinate to municipal taxes and but senior to any other liens on the property. The Benefit Assessment Lien runs with the property and may be transferred to future owners until the underlying C-PACE loan is fully repaid. While C-PACE loans are authorized by the Statute to be repaid through a special assessment on the real property's municipal tax bill, the municipal agreement permits EIC to administer billing and collections directly with the property owner and the capital provider. The capital provider has the right to foreclose on the property in the event of default on a C-PACE loan. EIC provides participating municipalities with an annual report detailing the C-PACE activity within their jurisdiction.

101 In New York City, the C-PACE program is similarly administered by the New York City Energy Efficiency Corporation.

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FEDERAL INCENTIVES

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TAX-EXEMPT BOND TRANSACTIONS

BY CHRISTOPHER A. ANDREUCCI, RUSSELL E. GAENZLE, THOMAS D. GLASCOCK AND ANDREW D. KOMAROMI

This section briefly describes the structure of a tax-exempt bond transaction in which a borrower receives the benefits of a lower interest rate because the bondholder is able to exclude the interest income when calculating its Federal and State income taxes. For a complete analysis of whether a specific project qualifies for tax-exempt financing, contact should be made with Harris Beach Murtha

A. HISTORY/OVERVIEW

1. History of "Municipal Bonds" and "IRBs"

The term "Municipal Bonds" has historically meant bonds backed by the full faith and credit of the jurisdiction and its taxpayers. The proceeds were used for public purposes. In the 1800s, in an attempt to secure financing for railroad lines and spurs, many railroad companies offered service only when the municipality paid for construction costs for the rail line. The municipality assumed revenues would be generated to repay the bonds. As a result, many railroad lines were originally constructed from bonds backed by municipalities and their taxpayers.

When revenues from many of these rail lines were insufficient to pay debt services on bonds, bondholders began to look to the municipality for payment. Some municipalities failed to pay, and certain municipalities challenged the authority of their prior legislative bodies to issue the bonds. The New York State Constitution now prohibits municipalities from loaning or providing private parties with tax dollars or using such municipalities' credit to benefit any private party. In other words, the New York State Constitution does not allow for a structure wherein a bond is issued by a municipality for the benefit of a private party and the payment for such bond is backed by a municipality. Partially as a result of these failed railroad financings, bondholders began to insist on opinions of qualified bond counsel for municipal debt financings. From this beginning came the concept of qualified bond counsel being listed in what has become known as the "Red Book."

Following the Great Depression, Congress adopted the 1933 Securities Act and then the 1934 Exchange Act (collectively, with all rules and regulations promulgated thereunder, the "Securities Regulations"), which attempted to bring some order to the process of securities offerings, generally through an emphasis on disclosure with "Rule 10b-5" and later, 15c2-12, under the Securities Regulations which is an anti-fraud/disclosure provision. Although municipal securities and tax-exempt industrial revenue bonds, now known as qualified private activity bonds, are generally exempt from the registration requirements of these securities laws, the anti-fraud provisions do apply. For this reason, issuers like IDAs and LDCs should review any offering documents.

In the 1960s, Mississippi law allowed a municipality to borrow on behalf of a private company and pay debt service with revenue from the project financed. These transactions were generally non-recourse to the municipality (i.e., not full faith and credit), but there was enough of a public

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purpose found in the structure that the Internal Revenue Service (the "IRS") treated the interest paid to the bondholder as exempt from Federal income tax. Mississippi also exempted interest income from their state and local income tax. From this point, the industrial revenue bond ("IRB") became a recognized economic development tool. By 1969, most states had adopted some form or structure to allow such bond transactions as an economic development tool. Given the inability of New York municipalities to offer such bond issue, IDAs were formed under Article 18-A of the New York State General Municipal Law (the "GML"), as amended (the "Act"). IDAs were first authorized in New York State in 1969.

In response to concerns over the volume of tax-exempt bonds utilized to finance private activities, Congress passed the Deficit Reduction Act of 1984 which established a state-by-state volume cap limitation on private activity bonds and restricted the type of qualified private activities. The volume cap per state was the greater of $150 per capita, ($100 per capita after 1986) or $200 million. By 1986, the United States Congress recognized that the government was losing tax revenue on the interest earned on IRBs and attempted to further limit the use of tax-exempt bond proceeds to certain "qualified" private activities. As a result, amendments to the Internal Revenue Code of 1986, as amended (the "Code") limited the types of projects that could be financed on a tax-exempt basis (giving rise to the term "qualified private activity bond"). Congress further limited this type of activity by imposing bond volume caps for certain types of projects. (See Section C, below.) The following sections provide a summary of certain key sections of the Code.

2. Overview

Projects that generally qualify for tax-exempt bond financing (or refinancing in certain instances) are:

(a) a manufacturing facility within the meaning of § 144(a)(12)(C) of the Code;

(b) a facility for a 501(c)(3) charitable entity under § 145 of the Code; or

(c) an exempt facility under § 142 of the Code (i.e.,, airport, docks and wharfs, mass commuting facility, facilities for the furnishing of water, sewage facilities, solid waste disposal facilities, qualified residential rental projects, facilities for the local furnishing of electric energy or gas, local district heating or cooling facilities, hazardous waste facilities, high-speed intercity rail facilities, environmental enhancements of hydroelectric facilities, qualified public educational facilities, qualified green building and sustainable design projects, qualified highway or surface freight transfer facilities, qualified broadband projects or qualified carbon dioxide capture facilities).

The company's first step is to complete an application for submission to the issuer (IDA or LDC). The application should specifically and completely describe the project, and the types of benefits sought, and include a commitment from the company to pay all costs incurred by the issuer in pursuing the transaction. The application should also include a cost/benefit analysis. At the same time, the issuer representative should confer with counsel to determine if the project qualifies for a tax-exempt bond issue. If the project on its face appears to qualify, the issuer's bond counsel will send the company a detailed questionnaire to confirm that the project, as proposed, does in fact qualify for a tax-exempt bond issue.

B. QUALIFICATIONS

The following is a brief summary of some of the more common limitations imposed on a tax-exempt bond issue.

1. Manufacturing Facilities

Definition. A manufacturing facility is one which is used in the manufacturing or production of tangible personal property (including the processing resulting in a change in the condition of such property). The 1986 amendments to the Code expanded the definition of a manufacturing facility to include facilities which are "directly related and ancillary" to a manufacturing facility, if (i) such facilities are located on the same site as the manufacturing facility, and (ii) not more than 25% of the net proceeds of the bonds are used to provide for directly related and ancillary facilities. These "directly related and ancillary facilities" include office and warehouse space. Ancillary activities must also be subordinate to and integral to the manufacturing process.

Volume Cap. Manufacturing facilities are subject to the statewide volume cap allocation. (See Section C, below.)

$10 Million Limitation (local test). The bond size is limited to $10 million per issue. This $10 million limitation includes the aggregate of: (i) the principal amount of the bonds to be issued; and (ii) prior outstanding bonds for the same company and its affiliates within the same municipality.

$20 Million Limitation (local test). The following three items cannot exceed $20 million in the

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aggregate: (i) the principal amount of the bonds to be issued (which cannot exceed $10 million; (ii) prior outstanding bonds for the same company and its affiliates within the same municipality; and (iii) the company's capital expenditures within the same municipality for a six-year period, looking three years back and three years forward from the date the bonds are to be issued. (See § 144(a)(4) of the Code.)

$40 Million Limitation (nationwide test). Section 144(a)(10) of the Code provides that if the face amount of the bonds plus the aggregate face amount of all other exempt facility bonds (which includes small issue bonds but also includes bonds for other exempt facilities such as solid waste disposal facilities) of the company and its affiliates exceeds $40 million (determined at a national level), tax-exempt manufacturing bonds for the benefit of the company cannot be issued.

Limitation on Land Acquisition. Section 147(c) of the Code limits the amount of tax-exempt bond proceeds that can be used for land acquisition to 25% of such proceeds.

Acquisition of Existing Property. Section 147(d) of the Code generally prohibits the use of tax-exempt bond proceeds for the acquisition of property (including equipment) unless the first use of such property is pursuant to such acquisition (i.e., "new" property). There is an exception to this general prohibition of acquisition of existing buildings (including equipment located therein as part of an integrated operation) if the rehabilitation cost of such building is at least 15% of the portion of the cost of acquisition of such property that is paid for out of bond proceeds. In the case of structures other than buildings, the rehabilitation costs must equal 100% of the purchase price paid with bond proceeds. For example, if a building is being acquired for $100,000 and all of such purchase price is paid for out of bond proceeds, at least $15,000 must be expended for the rehabilitation of such building before bond proceeds can be used. If the building includes equipment, the cost of replacing or upgrading such equipment can be counted toward satisfying this 15% requirement. These rehabilitation expenditures do not need to be paid from bond proceeds but can be paid from other funds; however, such costs must be paid within two years of the later of the date the building was acquired or the bonds are issued.

2. Qualified 501(c)(3) Bonds (Issued for the Benefit of a "501(c)(3) Organization")

Organizations that are exempt from Federal income taxation under the Code, commonly referred to as "501(c)(3) organizations," are generally permitted to finance their exempt activities on a tax-exempt basis. There are certain limitations on 501(c)(3) tax-exempt bond financings, including:

(a) the property that is to be provided by the net proceeds of the bonds must be owned by a 501(c)(3) organization (such entity can be the company or an affiliated entity so long as such entity is a 501(c)(3) organization); and

(b) at least 95% of the net proceeds of the bonds must be used by a 501(c)(3) organization in furtherance of its exempt (i.e., charitable) purpose.

$150 Million Limitation: A 501(c)(3) organization cannot generally be the beneficiary of more than a total of $150 million of outstanding bonds (issued for the benefit of the company and its affiliates anywhere in the country) which are not "qualified hospital bonds" (as defined in the Code). However, the 1997 amendments to the Code repealed this $150 million limitation for non-hospital bonds issued after August 5, 1997, to finance capital expenditures incurred after such date.

Volume Cap: Qualified 501(c)(3) bonds are not subject to volume cap allocation.

3. Solid Waste Disposal Facilities

On August 19, 2011, the Treasury Department issued final regulations (the "SWDF Regulations") regarding solid waste disposal facilities that are eligible for financing with tax-exempt private activity bonds. The SWDF Regulations implement a policy in favor of recycling by eliminating the "no-value" test that applied when determining whether material is solid waste under the old regulations. Under the "no-value" test, material did not qualify as solid waste unless the unwanted, unused, or discarded solid material had "no market value or other value at the place where the property is located." The SWDF Regulations apply to bonds sold on or after October 18, 2011.

Solid Waste Disposal Facilities. A "solid waste disposal facility" is one that is:

- Used to process solid waste in a qualified solid waste disposal process;
- Used to perform a preliminary function, which is collecting, separating, sorting, storing, treating, disassembling or handling solid waste that is preliminary to and directly related to one of

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the qualified solid waste disposal processes discussed below. A function will not be treated as preliminary if 50% or less of the materials that result from the function are not solid waste; or

- A functionally related and subordinate facility.

Solid Waste. The SWDF Regulations define "solid waste" as garbage, refuse and other solid materials derived from any agricultural, commercial, consumer, governmental or industrial operation or activity, if such waste is:

- Used material, defined as any material that has been previously used as a commercial, consumer or industrial product, or a component of such product; or

- Residual material, defined as any residual byproduct or excess unused raw material that remains from the production of any agricultural, commercial, consumer or industrial product.

Solid waste does not include: virgin materials (e.g., trees cut into logs); solids within liquids and liquid waste; precious metals; hazardous materials; and radioactive materials.

Qualified solid waste disposal process. As defined by the SWDF Regulations, a qualified solid waste disposal process includes the following:

- A final disposal process, defined as the incineration or permanent containment of solid waste or the placement of solid waste in a landfill;

- An energy conversion process, defined as any thermal, chemical or other process that is applied to solid waste to create and capture synthesis gas, heat, hot water, steam or other useful energy; and

- A recycling process, defined as any process that reconstitutes, transforms or otherwise processes solid waste into a useful product.

Volume Cap. Solid waste disposal facilities are subject to the statewide volume cap allocation. (See Section C, below.)

4. Multifamily Housing

Section 142(a)(7) of the Code allows tax-exempt bonds to be issued for Qualified Residential Projects. Qualified Residential Projects include projects that meet one of the following two tests:

20-50 Test: At least 20% or more of the residential units in the development are occupied by individuals whose income is 50% or less of the area median gross income.

40-60 Test: At least 40% or more of the residential units in the development are occupied by individuals whose income is 60% of the area median gross income.

Note that for tax-exempt bond purposes, the "Average Income Test" used for Low Income Housing Tax Credits (discussed below) does not apply.

Volume Cap. Qualified Residential Projects are subject to the statewide volume cap allocation. (See Section C, below.)

Projects that meet eligible requirements for tax-exempt bonds under Section 142 of the Code are also eligible for Low Income Housing Tax Credits, a detailed discussion of which is included herein under Other Federal Credits, Incentives and Classifications section below.

5. Restriction on Cost of Issuance

Section 147(g) of the Code limits the amount of costs of issuance that can be financed out of the proceeds of a tax-exempt bond to 2% of the paramount of the bonds being issued. The types of fees and costs that fall within this 2% cap include: underwriter's spread, counsel fees, financial advisor fees, rating agency fees, trustee fees, paying agent fees, accounting fees, printing costs, publication fees, and engineering and feasibility fees. Bond insurance fees, certain letter of credit fees, title insurance premiums and issuer administrative fees, however, generally do not count toward the 2% cap. In transactions where the costs of issuance exceed this 2% limitation, the company will be required to pay such excess out of equity or from the proceeds of other taxable financing.

6. Reimbursement

The use of bond proceeds to reimburse expenditures that were paid prior to the date of issuance of the bonds is governed by certain "reimbursement" regulations. Generally, the issuer (and/or the not-for-profit corporation in the case of a 501(c)(3) bond) must declare an "official intent" to reimburse prior expenditures with bond proceeds not later than 60 days after the original expenditure was incurred, and the bonds must be issued not later than 18 months after the later of (i) the date the payment is made, or (ii) the date the project financed with such payment is placed in service (but in no event later than three years after the payment is made).

7. Public-Private Partnerships/P3

Although not a category of bonds eligible for tax-exempt financing in and of itself, Public–Private Partnerships (PPPs), which is a partnership

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between the public sector and the private sector for the purpose of delivering a project or a service traditionally provided by the public sector, have become an increasingly popular way to get major infrastructure projects built. Compared with traditional procurement solutions, these arrangements show a significantly increased level of private-sector participation, with the goal of boosting the efficiency and effectiveness of the project through its entire life cycle, from development to the end of the operating phase. PPPs can also spread a project's cost over a more extended period and can thus free up public funds for investment in sectors in which private investment is impossible or otherwise inappropriate. Many P3 projects that result in loans being made to private businesses will have to be issued as taxable bonds except in the case of certain projects qualifying as exempt facility bonds. If the underlying infrastructure project is one that qualifies for tax-exempt bonds (such as in the case of exempt facility "mass commuting facility" bonds), then, in some cases, after obtaining volume cap as discussed in more detail below, this lower-cost financing tool may be utilized. In the case of exempt facility "qualified highway or surface freight transfer facilities" bonds, a separate volume cap applies which is derived from volume application being received from the Department of Transportation. If, however, the underlying infrastructure project does not qualify, or the project participants are unable to obtain volume cap, there may be ways to structure the PPP in a way that makes it a governmental bond or 501(c)(3) bond in order to gain access to the tax-exempt bond markets.

C. STATEWIDE VOLUME CAP ALLOCATION

1. Overview

Section 146 of the Code imposes an annual limit on the aggregate principal amount of private activity bonds that may be issued in each state, commonly referred to as the "statewide volume cap." Under § 146(d) of the Code, the volume cap for any particular state is equal to the greater of $225 million or an amount determined by multiplying the state's population by $75 (as adjusted for inflation). For calendar year 2025, the volume cap is determined by multiplying the State population by $130; the applicable volume cap will be the greater of the resulting number or $388,780,000. (Rev. Proc. 2024-40.) The 2025 private activity bond volume cap for New York State is $2,544,258,080 (based on population figures in IRS Notice 2024-25).

Certain types of private activity bonds are exempted from the volume cap requirements. These include:

(a) qualified veterans' mortgage bonds;

(b) qualified 501(c)(3) bonds;

(c) exempt facility bonds issued to finance airport facilities, dock and wharf facilities, environmental enhancements of hydroelectric generating facilities, qualified public educational facilities, qualified green building and sustainable design projects, or qualified highway or surface freight transfer facilities [although qualified highway or surface freight transfer facilities bonds are subject to a separate volume allocation from the U.S. Department of Transportation];

(d) exempt facility bonds issued to finance solid waste disposal facilities that are owned for Federal income tax purposes by a governmental unit;

(e) 75% of any exempt facility bond issued to finance high speed intercity rail facilities or qualified broadband projects, or 100% of such bond issued if those facilities are owned for Federal income tax purposes by a governmental unit; and

(f) 75% of any exempt facility bond issued to finance qualified carbon dioxide capture facilities.

In addition, bonds that are issued to refund outstanding private activity bonds in an amount not exceeding the outstanding principal amount of the bonds being refunded are also generally excluded from the volume cap allocation requirement.

The Deficit Reduction Act of 1984 created an annual private activity bond cap, and permitted states allocate the statewide cap to different issuers through gubernatorial executive order. From 1984 through 1987 Governor Mario Cuomo issued three executive orders for this purpose, allocating two-fifths of the statewide cap each to local industrial development agencies and state agencies, and the remaining one-fifth to the statewide bond reserve. The bond allocation provisions of the Deficit Reduction Act of 1984 were superseded by the Code by year-end 1987. Since then, the Code has provided a formula for allocating the statewide volume cap among state and local governmental issuers, and it allows states to provide, by statute, their own formula that supersedes the formula set forth in the Code. Since 1989, the New York State Legislature has, on an annual or bi-annual basis,

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adopted an allocation statute (the "Private Activity Bond Act"), allocating the statewide bond ceiling in equal thirds to local industrial development agencies (the "local agency set aside"), state agencies (the "state agency set aside"), and the statewide bond reserve.

The local agency set-aside is then divided among the various local IDAs based upon the ratio of the population of the jurisdiction served by each IDA to the population of the entire state. If a town, village or city is served by both a county IDA and a local town, village or city IDA, then the local agency set-aside for the municipality is further divided, with one-half to the county IDA and the other half to the local IDA. If there is a village IDA located within a town that has its own IDA, the village IDA receives an allocation of the local agency set-aside based upon the population of the village. The town IDA receives an allocation of the local agency set-aside based upon the population of the town, minus village residents. Finally, the statute allows a local IDA to surrender all or part of its local agency set-aside to another IDA in an overlapping jurisdiction.

Once an IDA has used up its local agency set-aside for a particular year, or in the case of an LDC seeking to issue bonds for a project requiring volume cap, application must be made to the statewide bond reserve for any additional allocation for further private activity bonds to be issued that year. The statewide bond reserve is administered jointly by the Director of the Division of the Budget for state agencies and by the New York State Department of Economic Development for local agencies.

Local agency set asides that have not been committed to projects as of October 15 of each year are recaptured by the state and reallocated to the statewide bond reserve. The statute mandates that each IDA must report the amount of its unused local agency set-aside to the Department of Economic Development by October 1st of each year. After October 15, an IDA that did not previously commit its local agency set-aside to a particular project or projects must apply to the Department of Economic Development for an allocation from the statewide bond reserve.

Under the Code, certain types of private activity bonds are eligible for a "carry-forward allocation" of the annual volume cap if the state has not used up its entire statewide volume cap. To accomplish this, the carry-forward Form 8328 must be filed with the IRS by February 15th of the carry-forward year. The types of bonds that qualify for this carry-forward allocation include certain exempt facility bonds, which include bonds issued for mass commuting facilities, facilities for the furnishing of water, sewage facilities, solid waste disposal facilities, qualified residential rental projects, facilities for the local furnishing of electric energy or gas, local district heating or cooling facilities, qualified hazardous waste facilities, high speed intercity rail facilities, qualified broadband projects and qualified carbon dioxide capture facilities. Once made for a particular project, a carry-forward election remains effective for up to three years. Note that bonds for small issue manufacturing facilities are not entitled to a volume cap carry-forward.

Under the State's Private Activity Bond Act, a local IDA cannot make a carry-forward election for any unused portion of its local agency set-aside or for an allocation received from the statewide bond reserve without first obtaining the approval of the Commissioner of Economic Development. An IDA seeking a carry-forward election for a qualifying project should, therefore, apply to the Department of Economic Development.

As indicated above, the Private Activity Bond Act has been readopted by the State Legislature annually, or in recent years, bi-annually. Until each year's Private Activity Bond Act is adopted, the state must abide by the allocation formula set forth in the Code. The Department of Economic Development and the Division of the Budget have in the past adopted an interim procedure by which an IDA or LDC can apply for a volume cap allocation before the adoption of the applicable year's Private Activity Bond Act statute. In essence, in those circumstances where a volume cap allocation has been awarded before the adoption of the statute, the state has made a direct assignment of its allocation under the Code to the local agency for that project. Once the annual allocation statute is enacted into law, any amount previously allocated to an IDA will be offset against the local agency set-aside allocated to that IDA under the statute.

D. PRIVATE PLACEMENT MEMORANDA/OFFICIAL STATEMENTS

Although municipal securities, such as those issued by IDAs and LDCs, are "exempt securities," and may be offered without registering with the SEC, under SEC Rule 131, certain offerings of municipal securities are deemed to include a non-exempt underlying loan, lease or installment sale agreement, and must qualify as an "exempt transaction." The most common example is a so-called

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private placement exemption to avoid registration. Each state has its own “blue-sky” laws, which govern the offer and sale of securities within its boundaries, but generally follow the same format and require a security to either be an “exempt security” or an “exempt transaction” in order to be exempt from registration. These bonds are generally referred to as revenue bonds since the debt is repaid from the revenue from the project and not from the resources of the issuer. The offer and sale of such securities does, however, remain subject to certain disclosures and anti-fraud provisions of both Federal and State securities laws. In order to offer the bonds for sale, the placement agent or underwriter, as the case may be, and its counsel will prepare a private placement memorandum ("PPM") when the bonds are to be privately placed (with generally less than five financial institutions) or an official statement ("OS") when the bonds are to be sold publicly. A PPM or OS is used to describe the company, the project, any credit enhancement and to provide financial information to the prospective bond purchaser. This is an issuer disclosure document that the IDA should approve and confirm adequate disclosure under an anti-fraud review by counsel to the IDA.

E. BOND MARKETS

Although bond transactions generally fall into certain categories, each transaction has its own unique specifications based on the type of project involved, whether a credit enhancement is being used, whether there are one or more bondholders, and the type of market into which the bonds are being sold. The company can choose to sell the bonds at a fixed rate, a variable rate, a "low floater" or a combination of differing rate structures. If the bond issue is meant to cover 100% of the cost of the project, the underwriter or holders of the bonds may require a debt service reserve fund or other reserve. In addition, certain costs may not qualify for use of the tax-exempt bond proceeds. As a result, the company may have to pay the costs at closing out of equity or borrow additional amounts on a taxable basis (the "Taxable Portion" or "Taxable Tail").

As described above, the bond can generally be a fixed-rate instrument, a variable-rate instrument or a low-floater. With a fixed-rate instrument or a variable-rate instrument, the underwriter receives a fee and sells the bonds in the public market at the time of closing.

A bond issued as a "low floater" is sold at the time of closing and resold by the underwriter on a periodic basis. The bond is usually purchased by entities looking for short-term investments. This type of investor demands liquidity and, therefore, will demand a direct pay letter of credit as a credit enhancement. Selling bonds as a short-term investment is, however, risky because a market for those bonds may no longer exist when the investor chooses to sell. Without a market, the underwriter will be unable to resell the bond. In such an event, the last bondholder would draw upon the letter of credit and the letter of credit issuer would demand payment from the company for the entire outstanding principal amount. If the company does decide to pursue a "low floater." this issue should be raised at an early stage and the company should negotiate a provision in the reimbursement agreement whereby the letter of credit issuer agrees to a repayment schedule over time if the underwriter cannot resell the bond.

This scenario does not exist with a fixed-rate instrument or a variable-rate instrument because the maturity date is generally 15 to 30 years. If, however, the fixed-rate or variable-rate instrument is issued with a letter of credit as a credit enhancement, the letter of credit will normally expire in 5, 7 or 10 years. In the event that the company fails to negotiate an extension to the letter of credit or fails to identify a replacement letter of credit before the termination date of the original letter of credit, a similar event occurs. The bondholders can make a draw on the letter of credit and the letter of credit issuer will demand payment for all outstanding principal.

In addition, for tax years beginning after December 31, 2022, the interest on all tax-exempt obligations held by certain large corporations (generally with earnings over $1 billion) is included in the “adjusted financial statement income” of such corporations for purposes of the Federal alternative minimum tax imposed on such corporations.

F. CREDIT ENHANCEMENTS

The interest rate on the bonds and the terms and conditions of the transaction depend heavily on the creditworthiness of the company sponsoring the project because the debt service is paid from revenues generated by the project. Certain companies have creditworthiness that allows them to borrow money at or below prime. Other companies have creditworthiness that requires an interest rate in excess of prime when borrowing money. By structuring the transaction as a tax-exempt issue, however, the savings should be roughly two to three percentage points below what the company would pay if it borrowed the money directly from a commercial lender.

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If the company involved is a start-up company or does not qualify for a credit rating by a rating agency such as Standard & Poor's, Fitch Ratings or Moody's, the bond issue is called an "unrated issue." In order to sell an unrated issue, the market will generally demand a higher interest rate. If the company is a start-up or does not have sufficient creditworthiness, it may have to obtain a credit enhancement in order to sell the bonds. In its broadest sense, a credit enhancement is a commitment from a third party with strong creditworthiness to pay off the bond if the company is unable to do so. The credit enhancement will generally come in the form of a letter of credit issued by a bank or other financial institution. In addition, State and/or Federal agencies may have programs that provide guarantees that can act as the credit enhancement. The underwriter will assist the company in determining if and what type of credit enhancement is needed.

As noted above, the most common type of credit enhancement is a letter of credit issued by a bank or other financial institution. The letter of credit can be issued as either, (i) a standby letter of credit that is drawn upon by the bondholders or the trustee on behalf of the bondholders when the company fails to make the agreed upon payments or, in most instances, (ii) a direct pay letter of credit where the bondholders draw upon the letter of credit each time a payment is due under the bonds and the company reimburses the letter of credit issuer as those payments are made. A direct pay letter of credit, or some other liquidity facility, will be required if the company and the underwriter decide to structure the transaction as a "low floater."

G. TRUSTEE

When bonds are sold to multiple bondholders, a trustee will be appointed to receive payments on behalf of the bondholders and to hold the collateral security interests for the benefit of the bondholders. The trustee is generally a trust company authorized to perform such services in the state where the transaction occurs. The issuer and the trustee will enter into an Indenture of Trust that sets forth the terms of the bonds and the trustee's rights and responsibilities on behalf of the bondholders.

H. PUBLIC APPROVAL REQUIREMENTS

Under § 147(f) of the Code, certain public approvals are required before an IDA or LDC can issue a tax-exempt bond. The Code and the regulations require that the "applicable elected representative" consent to the issuance of the bond after a public hearing is held "on reasonable public notice." The applicable elected representative is usually the popularly elected CEO of the benefited municipality – the county executive, mayor or town supervisor. If there is no popularly elected CEO, the elected legislative body of the municipality – the county legislature, city council, town or village board – becomes the applicable elected representative. Reasonable public notice requires the notice to be published (including on the issuer's website) at least 7 days before the public hearing. Note, the public hearing required under § 147(f) of the Code is in addition to the public hearing required of IDAs (not LDCs) by § 859-a of GML, which hearing requires a 10-day notice period. However, if the required hearings are carefully scheduled, one hearing can be held to satisfy both § 147(f) of the Code and § 859-a of GML. In response to the COVID 19 restrictions, the IRS has permitted that public hearings be held remotely indefinitely.

I. SUMMARY

The complexity and costs involved in a bond transaction vary from the relatively simple structure of a direct purchase (which may not require an underwriter, financial advisor, credit enhancement, trustee or their various counsel to participate), to the complex structure of a transaction where bonds are issued in the "low floater" market or other bonds being sold to institutional investors in the open market. The "low floater" market is complex because it requires a public market for bondholders, which requires an underwriter. The underwriter's counsel has to prepare a PPM or OS. A direct-pay letter of credit or similar instrument is needed to provide credit enhancement and/or a liquidity facility, and a trustee and its counsel will be involved. Each one of these parties brings added cost and complexity to the transaction. A cost-benefit analysis should be performed at each step to determine if the additional party and the related costs are necessary.

In addition, the foregoing discussion is intended only to highlight certain key aspects of the Code and the types of projects that may qualify for tax-exempt financing. Contact with qualified bond counsel should be made as early on in the process as possible to raise any potential problems or limitations imposed by the Code or otherwise.

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J. CHANGES DURING 2025 AND CURRENT STATUS

The primary change to tax-exempt bonds during 2025 was passage of the One Big Beautiful Bill Act ("OBBBA"), which was signed into law on July 4, 2025. It generally preserves the existing tax-exempt status of municipal bond interest, with specific modifications for certain types of private activity bonds.

Among the modifications, the OBBBA permanently reduced the required tax-exempt bond financing threshold for projects to qualify for the 4 percent the Low Income Housing Tax Credit ("LIHTC"), by reducing the bond test from 50 percent of project basis financed by a private activity bond to 25 percent of aggregate basis. This should allow for more affordable housing development to access the 4 percent LIHTC by using less of a state's private activity bond volume cap, thereby facilitating the development of more affordable housing projects. The OBBBA also provided for a permanent 12 percent increase in a state's 9 percent LIHTC allocation. These changes are effective for 2026, and they are discussed in greater elsewhere in this handbook.

Another key change caused by the OBBBA was its creation of a new category of tax-exempt private activity bonds for spaceports and spaceparks, allowing financing on or after July 5, 2025, for aerospace infrastructure (e.g. manufacturing, launching, and reentry) by amendments to Internal Revenue Code ("IRC") §142 which treat them similarly to bonds issued for airport improvements. That said, importantly, bonds issued for spaceports and spaceparks are not subject to volume cap, which means that there is no statutory limit on the amount of bonds that may be issued for these purposes.

Under the OBBBA, a "spaceport" is any facility (including fixed assets and related equipment): (i) located at or in close proximity to a launch site or reentry site used for manufacturing, assembling or repairing spacecraft, space cargo, or any component thereof; (ii) providing launch or reentry services; (iii) providing flight control operations; or (iv) transferring crew, spacecraft participants, or space cargo to or from spacecraft. "Spaceparks" include both manufacturing and assembly space facilities.

Pursuant to the governmental ownership requirements, the financed spaceport or spacepark must be owned by a state or local government unit, but it may be leased to a private entity or operator with the lease payments used to pay debt service on the issued bonds. While the tax-exempt bonds may not be directly or indirectly guaranteed by the federal government, under the OBBBA a spaceport or spacepark bond will not be treated as federally guaranteed merely due to the payment of rent, user fees, or other charges by the United States (or an agency thereof) for use of the facility. Moreover, spaceports need not be open to the general public.

Consistent with changes caused by the OBBBA (including the creation of spaceports and spaceparks as a new category of tax-exempt private activity bonds), during September 2025 the Internal Revenue Service ("IRS") revised its Form 8038 to be used by the issuers of tax-exempt private activity bonds to provide the IRS with the information required by IRC §149 and to monitor compliance with the requirements of IRC §§141 through 150. The IRS Form 8038 instructions were also updated, by those now dated September/October 2025. As updated, the IRS Form 8038 reflects new related reporting requirements, such as for spaceport financing on line 11q, and with lines for new exempt facilities such as broadband and CO2 capture facilities to reflect Infrastructure Investment and Jobs Act provisions.

As in the past, issuers must file with the Department of the Treasury, Internal Revenue Service Center, Ogden, Utah 84201 a separate Form 8038 for each issue of applicable tax-exempt private activity bonds by the 15th day of the 2nd calendar month after the close of the calendar quarter in which the bond was issued. For example, if the project closed on January 2, 2026, the Form 8038 must be filed by May 15, 2026.

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EMPOWERMENT ZONES, ENTERPRISE COMMUNITIES AND RENEWAL COMMUNITIES

As of December 31, 2004, the enterprise communities' designation expired. As of December 31, 2009, the renewal community tax credits expired and have not been extended. As of December 31, 2014, the empowerment zone designation expired.

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FEDERAL HISTORIC REHABILITATION TAX CREDIT ("HRTC" OR "HTC")

BY THOMAS D. GLASCOCK

The Federal Historic Rehabilitation Tax Credit ("HTC") program, which has its roots in the National Historic Preservation Act of 1966, which created the National Register of Historic Places, is an indirect Federal subsidy to finance the rehabilitation of historic buildings with a 20% tax credit for qualified expenditures.

I. Details On The HTC Program:

A. 20% CREDIT

Under section 47 of the internal revenue code ("irc"), the rehabilitation of historic buildings may entitle the property owner to a 20% tax credit, as described below.

- Taxpayers are entitled to a rehabilitation investment credit equal to 20% of qualified rehabilitation expenditures with respect to certified historic structures, claimed over a five-year period. The building must be a "certified historic structure" (this is, be listed on the National Register, or in a registered historic district and certified as contributing to the significance of the district.)
- The rehabilitation credit becomes available in the taxable year the "qualified rehabilitated building" is placed in service, provided that all requirements are met.
- Rehabilitation includes renovation, restoration or reconstruction of the building, but it does not include either enlargement of the building or new construction.
- The rehabilitation must be substantial, that is, during the 24-month measuring period, the cost of rehabilitation must exceed the greater of $5,000 or the building's adjusted basis. A 60-month measuring period may be substituted for the 24-month period if certain requirements are met.

Prior to enactment of The Tax Cuts and Jobs Act (P.L. 115-97) on Dec. 22, 2017, which went into effect on January 1, 2018, a 10% non-historic rehabilitation tax credit for pre-1936 buildings was also available for structures not deemed a certified historic structure and not used as residential rental property. Moreover, pursuant to this law, taxpayers must now take the 20% credit ratably

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over 5 years instead of in the year they placed the building into service.

B. QUALIFIED REHABILITATION EXPENDITURES ("QRES")

- IRC 47 generally requires that the owner to have QREs for a qualified rehabilitated building. A qualified rehabilitated building includes any building and its structural components that:
  - Has been substantially rehabilitated as defined in IRC 47(c)(1)(B); and
  - Was placed in service as a building before the beginning of the rehabilitation; and
  - Is a certified historic structure under IRC 47(c)(3); and
  - Has allowable depreciation.
- The HTC amount is equal to the 20% credit times the QRE amount. QREs are generally qualified "hard costs" and eligible "soft costs" (that is, construction period interest, architect fees, engineering fees and reasonable developer fees), and are generally taken into account in the year in which the qualified rehabilitated building is placed in service.

C. DEPRECIATION

- HTCs are available only if the taxpayer uses the straight-line method of depreciation (that is, 27.5 years for residential rental property and 39 years for non-residential real property).

D. TAX-EXEMPT USE PROHIBITION

- No HTC can be claimed with respect to any expenditure in connection with a rehabilitation which is allocable to the portion of such property which is "tax-exempt use property.". "Tax-exempt use property" is nonresidential real property (which includes residential rental property) leased to a tax-exempt entity under a "Disqualified Lease," where a "Disqualified Lease" means any lease of more than 50% of the property to a tax-exempt entity, but only if --
  - (a) Part or all of the property was financed by tax exempt bonds and the tax-exempt entity (or a related entity) participated in such financing; or
  - (b) The lease has a fixed or determinable price purchase or sale option (or equivalent thereof) which involves such entity (or a related entity); or
  - (c) The lease has a lease term in excess of 20 years; or
  - (d) The lease occurs after a sale (or other transfer) of the property by, or lease of the property from, the tax-exempt entity (or a related entity) and such property has been used by the tax-exempt entity (or a related entity) before such sale (or other transfer) or lease. But, this rule shall not apply to any property which is leased within three months after the date such property is first used by the tax-exempt entity (or a related entity).
- Exceptions to this use prohibition exist, however, as follows:
  - Exception #1: If the property is rented and the rental income is subject to tax as unrelated business taxable income ("UBTI"), then the property shall not be treated as leased to a tax-exempt entity under a Disqualified Lease.
  - Exception #2: A tax-exempt entity which makes an election under IRC 168(h)((6)F)(ii) to be treated as a taxable entity shall not be treated as a tax-exempt entity, and any income recognized by the electing tax-exempt entity shall be treated as UBTI.

E. APPLICATION PROCESS

The application for HTCs requires the following steps.

- Part 1: The applicant certifies the historic significance of the building.
- Part 2: The National Park Service ("NPS") determines the qualification of the proposed QRE work.

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- Part 3: An application for HTCs is submitted once the project is complete, and certifies that the project is a "certified rehabilitation."

F. CLAIMING THE CREDIT

- Taxpayers claim the HTC on an IRS Form 3468, Investment Credit. Entities that do not claim a rehabilitation credit but pass though qualified rehabilitation expenditures also file Form 3468.
- The HTC is available to the person(s) and/or the entity that holds title to the property, or to a master tenant to whom the Federal HTC is passed under Internal Revenue Code regulations.
- As indicated above, based on changes made in the tax law in 2018 (caused by The Tax Cuts and Jobs Act), the credit is taken over 5 years in equal 20% amounts. If the credit, or a portion of tax credit, cannot be used in the year placed in service, the excess can be carried back one year and forward for 20 years.
- The Federal HTC is subject to the alternative minimum tax and the passive activity rules.

G. RECAPTURE

All or a portion of an HTC is subject to recapture if the property no longer qualifies as investment credit property or the person(s) and/or the entity that hold(s) title transfers its interest in the property before the end of a 5-year recapture period, as follows:

- If the building is sold, or ceases to be business-use property, during the 5-year period after placed in service, recapture occurs at a rate of 20% per year, including the year of recapture.
- If a partner sells all of their partnership interest, or if a partner's interest is reduced by 33.33% or more from what it was when the rehabilitated property was placed in service, the percentage reduction is treated as a proportional disposition of the property.

H. GRANTS

- If a grant is taxable (that is, a developer has control over grant funds), the developer is eligible for a basis increase in the property and the HTC can be claimed on expenditures made with the grant funds.
- If the grant is not taxable (that is, it is a National Historic Preservation Act grant or the developer has no grant control), the developer is not eligible for a basis increase in the property and the HTC cannot be claimed on expenditures made with the grant funds.
- Grants received by corporate developers are considered tax-exempt contributions of capital by a non-shareholder, and, therefore, the developer is not eligible for a basis increase in the property and no HTC may be claimed for expenditures made with the grant funds.

II. Rev. Proc. 2014-12

- Revenue Procedure 2014-12 provides a safe harbor given in direct response to the holding in *Historic Boardwalk Hall, LLC v. Commissioner*, 694 F.3rd 425 (3rd Cir 2012) (the "HBH case"). In the HBH case, the 3rd U.S. Circuit Court of Appeals denied the taxpayer (the investor partner) the right to claim HTCs as it was not a true partner in the partnership through which the HTCs passed as it lacked both a meaningful downside risk and a meaningful upside potential.
- The safe-harbor rules of Rev. Proc. 2014-12 apply equally to project-level partnerships, and master-lease partnerships in which the developer has elected to pass the historic tax credits through to a master tenant.
- Rev. Proc. 2014-12 is effective for HTCs for projects placed-in-service on or after 12-30-13.
- The four key partnership structural provisions which must be satisfied to be eligible for the safe harbor of Rev. Proc. 2014-12 are as follows:

(1) **Minimum Partnership Interests:** the developer must at all times have a minimum of a 1% interest in each material item of partnership gain, loss, deduction and credit, and the investor a 5% interest. Most deals are structured initially with the developer and investor having 1% and 99% interests respectively, which may be "flipped" to 95% and 5% interests, respectively, with the change occurring following the end of the 5-year compliance period (that is, five years after the project is placed-in-service).

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(2) **Guarantees:** The developer may:

- guarantee the investor against recapture of the HTCs for direct acts or omissions that cause the partnership to fail to qualify for the HTC (but not against recapture based on an IRS challenge of the partnership transaction structure).
- provide unfunded completion, operating deficit, financial covenant breach (but not minimum net worth covenant) and/or environmental guarantees. Cash reserves are allowed, provided they total no more than reasonably projected 12-month operating expenses.

(3) **Exit Structure:** At the end of the 5-year compliance period, the developer may not have a call option. Rather, the investor may have a put option, provided the sales price is less than the fair market value of the investor's partnership interest at the time of exercise.

(4) **Bona Fide Investment**: This factor has four separate terms:

Equity timing: An investor must contribute at least 20% of its total expected equity prior to the placed-in-service date, and at least 75% of the investor's equity must be fixed prior to the placed-in-service date. Typical equity adjustments based on milestones are allowed but cannot adjust the investor's commitment by more than 25%.

Bona fide investment: The investor's interest must be a bona fide equity investment with a reasonable anticipated value that is *commensurate* with the investor's overall percentage interest in the partnership, separate from tax attributes allocated by the partnership to the investor, and that is not substantially fixed in amount.

Commensurate value: To have a commensurate value requires that the investor receive the cash and other economic benefits – other than HTCs – on a basis equal to its percentage interest. This requirement continues to allow an investor's interest in the partnership to be determined principally by the amount of anticipated HTCs to be allocated.

Value impacts: An investor's interest may not be depressed through the use of developer fees, disproportionate distributions, preferred returns, leases or other business terms that are not reasonable relative to arm's-length development transactions not using HTCs. A sublease with a term not shorter than the master lease is deemed unreasonable. This is really the key requirement in Rev. Proc. 2014-12, and it likely requires third-party verification from accountants or appraisers as a condition to a tax opinion from legal counsel.

Note, the safe harbor was modified by T.D. 9776 (July 22, 2016) by (1) changing all references to allocations of Section 47 rehabilitation credits to refer instead to allocations of qualified rehabilitation expenditures under IRC Sec. 47(c)(2); and (2) deleting the sentences in section 3 and section 4.07 that refer to allocation by a partnership of the income inclusion required under IRC Sec. 50(d)(5).

III. Rev. Proc. 2023-3:

The IRS does not issue advance rulings on a partnership allocation of the HTC, the validity of the partnership or whether any taxpayer is a valid partner in the partnership.

IV. State Tax Credit Programs:

Many states have their own tax credit program in place, with most mirroring the Federal HTC program but with different percentage amounts.

V. Historic Preservation Easements:

An historic preservation easement is a voluntary legal agreement made by the property owner, typically in the form of a deed, which permanently protects an historic property by placing restrictions on the future development or alteration of the historic property. By donating such an easement, the property owner may be eligible for various tax benefits, such as a Federal income tax deduction.

VI. Changes during 2025 and Current Status:

The HTC Program was not included in the "One Big Beautiful Bill" Act (Public Law 119-21). Accordingly, as of late 2025, it remains largely governed by rules established in 2017 pursuant to the 2017 Tax Cuts and Jobs Act ("TCJA").

Even so, a proposed Historic Tax Credit Growth and Opportunity Act of 2025 was introduced in April 2025 (S. 1459 / H.R. 2941) (collectively, the "HTC-GO Bill"), which if enacted would "modernize" and enhance tax incentives for building rehabilitation and historic building preservation, to make them more flexible and attractive for investors.

Key provisions to the HTC-GO Bill include:

i. Making available, effective for property placed in service after December 31, 2023, a rehabilitation credit equal to 20

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percent of a building's "qualified rehabilitation expenditures" ("QREs), to be claimed in the year the building is placed in service, to be; and

ii. Returning the 20 percent credit to a one-year delivery model, rather than the five-year spread created by the TCJA; and

iii. Providing an increase to the HTC amount from 20 percent to 30 percent for "qualifying small projects", but with rehabilitation limited to $3,750,000 ($5,000,000 for projects in "rural areas"); and

iv. Permitting the transfer of the HTC to third-party investors for certain small projects, to facilitate project financing; and

v. Decreasing the "substantially rehabilitated" eligibility requirement from 100 percent to 50 percent of a building's adjusted basis, and modifying the definition of "substantial rehabilitation" to be the greater of 50 percent of the adjusted basis of such building (and its structural components) or $5,000; and

vi. Eliminating the existing requirement that a building's tax basis be reduced by the credit amount, to increase the HTC's value.

In addition, during 2025, significant activity occurred at the state level, to supplement federal credits. This included in New York State, which enacted legislation to permit the transfer effective for tax years beginning January 1, 2026, of state historic tax credits to other taxpayers.

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NEW MARKET TAX CREDITS ("NMTC")

BY CHRISTOPHER A. ANDREUCCI AND SHAWN M. GRIFFIN

The New Market Tax Credit ("NMTC") Program was instituted as part of the Community Renewal Tax Relief Act of 2000. This Federal tax credit program is unique because unlike other low-income community tax programs that address purely housing issues, this tax credit is aimed at businesses. The NMTC Program is designed to bring new investment capital to low-income communities over a seven-year period. The source of capital is generated from lenders and private investors. The goal of the program is to provide a direct means to channel this investment capital to businesses in low-income communities. The primary incentive offered to investors is a credit against their Federal income taxes equal to 39% over the seven-year investment period. In 2025, the One Big Beautiful Bill Act made the NMTC Program permanent by allocating of five billion dollars in annual tax credits to the program.

New Markets Tax Credit in a Nutshell:

CDEs must use substantially all of the proceeds from **QEIs** to make **QLICIs** in **QALICBs** located in **LICs**

A. CDES:

A CDE, or *Community Development Entity,* is any domestic, for-profit or not-for-profit corporation or partnership formed and certified as such by the Community Development Financial Institutions Fund ("CDFI"), which satisfies the following two tests:

- Primary Mission Test: The primary mission of the CDE must be to serve, or provide investment capital for, low-income communities ("LICs") or low-income persons ("LIPs").
- Accountability Test: The CDE must maintain accountability to residents of LICs within the CDE's chosen service area through their representation on CDE governing or advisory boards by having at least 20% of its members of its governing board or its advisory board(s) being persons who are representative of the LIC within its service area. Service areas can be local, statewide (or multi-states) or national.

B. QEIS:

- A QEI is a *Qualified Equity Investment* in the form of a cash investment by a taxpayer for an equity interest in a CDE.
- Substantially all (85%) of the QEI must be used to make QLICIs within 12 months after the date the QEI is made (the "Substantially-All Test").

C. QLICIS:

- A QLICI is a *Qualified Low Income Community Investment*, which includes either a loan to, or an equity investment in, a QALICB. Invariably, it is a loan.

D. QALICBS:

A QALICB is a *Qualified Active Low Income Community Business* which satisfies the following rules:

Qualified Business: any business enterprise except "Excluded Businesses":

- the "sin businesses" (applicable also to tenant businesses): country clubs, golf courses, massage parlors, hot tub

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facility, suntan facility, racetracks, gambling facilities (including casinos) and liquor stores;

- businesses holding intangibles for sale or license;

- projects which are wholly residential rental real estate projects (but mixed-use projects are allowed as long as the residential component does not exceed 80% of overall revenues (80/20 test)

Active Business:

- the CDE must *reasonably expect* the business will generate revenues within 3 years after the QLICI is made.

Low Income Community Business:

- To be a QALICB, the business must also satisfy the following five LIC tests:

- Gross income test (at least 50% revenue generated in the LIC)

- Tangible property test (at least 40% of asset use is in the LIC)

- Services test (at least 40% of employee services performed in the LIC). If no employees, satisfied by 85% of property usage

- Collectibles (no more than 5% of QALICB assets are collectibles)

- Non-qualified financial property (NQFP) (less than 5% of QALICB's property is attributable to NQFP (essentially, cash and equivalents).

E. LOW-INCOME COMMUNITY ("LIC"):

- A low-income community ("LIC") is any population census tract that:

  - has a poverty rate of at least 20%; or

  - if the tract is located outside of a metropolitan area, the median family income ("MFI") does not exceed 80% of statewide median family income; or

  - if the tract is located within a metropolitan area, the MFI does not exceed 80% of the greater of, (i) statewide median family income, or (ii) the metropolitan median family income.

The Secretary of the Treasury is given the authorization to target areas for qualification and designation as a LIC that might not otherwise meet the above requirements by satisfying the "targeted populations" rules contained in revised Treasury Regulations. (See also Notice 2006-60).[102]

F. CLAIMING THE NMTC:

- The NMTC is 39% times the QEI, taken over seven years (5% in years 1-3 and 6% in years 4-7).

- Tax basis is reduced by the amount of the NMTC taken with respect to a QEI.

- If a recapture event occurs during the 7-year compliance period, the tax credit is recaptured back to year one.

- A recapture event occurs when: (i) the CDE ceases to be a qualified CDE; (ii) the proceeds of the QEI cease to remain QLICIs; or (iii) there is redemption of the QEI investment without a reinvestment.

G. REINVESTMENTS:

- Amounts received by a CDE in repayment of capital, equity or principal with respect to a QLICI in excess of the "Substantially-All" test, must be reinvested by the CDE in another QLICI no later than 12 months from the date of receipt to continue to be treated as continuously invested in a QLICI; except, amounts so received during the seventh year of the 7-year credit period do not have to be reinvested by the CDE in a QLICI to be treated as continuously invested in a QLICI.

[102] On June 30, 2006, the IRS and Treasury Department released Notice 2006-60, which announced that the NMTC regulations would be amended to provide rules relating to how an entity meets the requirements to be a QALICB when its activities involve certain targeted populations under IRC § 45D(e)(2), Proposed Regulations were issued, which followed the rules of Notice 2006-60. The CDFI also issued further guidance through a FAQ document in September 2008 which provides some additional guidance. Final Regulations were issued by Treasury on December 5, 2011. A QALICB must meet one of the following 3 tests to satisfy the Targeted Population rules: (a) Gross income: at least 50% is derived from sales, rentals, services or other transactions with LIPS; (b) Employees: at least 40% of an entity's employees are LIPs (determined at the time of hire, even if the employee's income [Family income standard applies] takes him/her out of LIP status during the 7 year credit period); or (c) Ownership: at least 50% of ownership of the entity is owned by LIPs (determined at the time of the QLICI, even if the owner's income takes him/her out of LIP status during the 7 year credit period).

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OPPORTUNITY ZONES

BY RYAN E. DUNN, THOMAS D. GLASCOCK AND JAMES B. MANN

Tax Incentives Available in the Opportunity Zones Program

On December 22, 2017, the Qualified Opportunity Zones ("QOZ") program was enacted as part of the Tax Cuts and Jobs Act ("TCJA") [103]. On December 19, 2019, the IRS issued final regulations that provide guidance for the QOZ program, addressing such matters as the type of gain that may be deferred by QOZ investors, the time by which corresponding amounts must be invested in funds, and how investors may elect to defer specified gains. [104] The regulations also contain rules applicable to "Qualifying Opportunity Funds," including rules for self-certification, valuation of assets, and guidance on "Qualified Opportunity Zone Businesses."[105] The effective date of the final regulations was March 13, 2020, but the final regulations could be relied upon for taxable years beginning after December 21, 2017, through March 13, 2020, provided they were applied in their entirety and in a consistent manner.

An opportunity zone is an economically distressed area designated by the U.S. Department of the Treasury to attract private investment from Qualified Opportunity Funds ("QOF"). A QOF is an investment vehicle that is formed or elected for tax purposes to be treated as either a partnership or a corporation for the investment of eligible property in an opportunity zone. Investors with unrecognized capital gains or who wish to invest new capital in QOFs are eligible to receive tax benefits, including deferment and exclusion of their gain (depending on the length of time that the funds are invested in the QOF). To receive the tax benefits, the QOF must satisfy several requirements, including making timely, qualified investments in opportunity zones, as described below.

A. BACKGROUND

1. Designation of Zones

Under the Opportunity Zones legislation, states were able to designate QOZs that comprise a population census tract that is a low-income community, and thus designating up to 25% of such low-income community tracts as QOZs. The statute allowed for tracts contiguous to low-income tracts that are not in low-income communities to be also designated a part of the QOZ; however, only 5% of the state's nominations can be census tracts contiguous with low-income communities, and the median family income in the census tract can be no more than 12% of the median family income in the low-income community. As of the date of this publication, the designations are final, with approximately 8,764 QOZs in the United States, including 514 QOZs in New York State (plus 17 non-low-income contiguous tracts). A list of QOZs can be found in IRS Notices 2018-48 and 2019-42.

2. Capital Gains Deferral and Gain Exclusion

As indicated above, the QOZ program created incentives intended to encourage development and investment in designated low-income communities. Significant Federal income tax benefits are available to taxpayers who invest in businesses located within designated QOZs, with such benefits essentially falling into three categories: (i) temporary deferral of capital gains; (ii) permanent exclusion of a portion of deferred gains for fund investments held for five to seven years; and (iii) permanent exclusion of post-acquisition gains. As such, the length of time the taxpayer holds the

[103] Internal Revenue Code (the "Code") §§1400Z-1, 1400Z-2.
[104] Treas. Reg. §1.1400Z-2.
[105] Treas. Reg. §1.1400Z-2(a)-1 - (e)(1).

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QOF investment determines the tax benefits they receive, with deferral or exclusion available for qualifying capital gains (including qualified 1231 gain), with special rules applicable to §1256 contracts and deferral or exclusive available only gains that would be recognized for Federal income tax purposes before January 1, 2027 (but excluding gains from straddle transactions and those with a related person). Moreover, both individual taxpayers and corporations, partnerships, REITs, RICs, trusts and estates are all eligible to defer gain.

Under the QOZ tax regime, eligible capital gains are deferred if such gains are reinvested in a QOF within 180 days after the date the gain would be recognized for Federal income tax purposes (the date of sale or exchange). Individuals who are deferring gains received from a pass-through entity (such as a partnership or S-corporation) may start the 180-day period for investing the gain at the end of the entity's year or on the day of the sale or exchange creating the gain. Eligible gains are deferred from inclusion in gross income until the first of the following dates: (i) the date the investment is sold or liquidated; or (ii) December 31, 2026. When this recognition event occurs, the capital gains owed by the investor may be reduced by ten percent if the QOF investment is held for five years and by an additional five percent if such investment is held for seven years. In addition, if held for a period of at least ten years, post-acquisition gains on investments held in QOFs are excluded from a taxpayer's gross income entirely. More specifically, investors who hold the QOF investment (i) for at least five years are eligible for a basis increase in the QOF investment of 10% on deferred gain, (ii) for at least seven years are eligible for a basis increase in the QOF investment of 15% on deferred gain, and (iii) for at least ten years are eligible to elect to adjust the basis of the QOF investment to its fair market value on the date that the QOF investment is sold or exchanged.

Gain Deferral Example - An example of the capital gains deferment and savings can be found below: If an investor has $1 million in capital gains from a stock sale, the investor can defer recognition of the $1 million in capital gains if the $1 million is invested in a QOF within 180 days of the sale. When the investment is made, the basis will be $0. However, if the investment is maintained in the QOF for five years, the investment will receive an increase of its basis equal to $100,000 (10% of the original investment). If the investment is maintained for an additional two years, the investment's basis will increase to $150,000 (15% of the original investment). On the recognition event, the investor will recognize capital gains on $750,000, instead of the original $1 million. If the investment is maintained for 10 or more years, the basis of the investment becomes its fair market value on the day it is sold. If the investment has grown over the 10 years it was maintained in the QOF, say to $10 million, the investor will not recognize any additional capital gains when the investment is sold. When the investment is sold for $10 million after the 10 years, the investor would have only recognized capital gains on $750,000 of the investment (the amount paid on the recognition event).

B. INTRODUCTION TO QUALIFIED OPPORTUNITY ZONE FUNDS

1. Qualified Opportunity Funds ("QOF")

A QOF is an entity which (i) files either a partnership or corporate Federal tax return (including a limited liability company) and is organized for the purpose of investing in Qualified Opportunity Zone Property ("QOZP") (as such term is defined below), (ii) holds at least 90% of its assets in such property as measured on two annual testing dates (the average of the percentage of QOZP held by the QOF on the last day of the first six-month period of the QOF's tax year and on the last day of the QOF's tax year), and (iii) elects to self-certify by annually filing an IRS Form 8996 with its timely filed Federal tax returns, taking extensions into account.

If a QOF has an applicable financial statement as defined in Treas. Reg. §1.475(a)-4(h), then the value of its assets for purposes of the 90% asset test is the value reported on its applicable financial statement for the relevant reporting period. For QOF's without an applicable financial statement, the appropriate value is the cost of the assets. For purposes of applying the 90% test, and as discussed in further detail below, a safe harbor rule applies to working capital. A QOF must pay a penalty for each month it fails to hold at least 90 % of its assets in QOZP.

As indicated above, an IRS Form 8996 must be filed annually to report that the QOF meets the 90% asset test or to determine the penalty if it fails to meet the asset test. This is required even in years the QOF has no taxable income. During the year an entity first certifies itself as a QOF, it must identify the first tax year that it wishes to be a QOF and may identify the first month of that tax year that it wishes to be a QOF. If the starting month is not specified, then the first month of the tax year is treated as the month in which QOF status is effective. If a partnership or corporation becomes a QOF in the seventh or later month of the tax year, only the QOF's assets on the last day of the tax year will count for purposes of the 90% asset test.

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Notably, any investment made in the potential eligible QOF prior to such entity's first month as a QOF does not qualify for the capital gains deferral benefits afforded by the program.[106] Notwithstanding the foregoing, a pre-existing entity may certify as a QOF, but the entity must satisfy all QOZ program requirements, including the requirement that QOZP must be acquired after December 31, 2017.

2. Qualified Opportunity Zone Property ("QOZP")

QOZP is defined as a QOF's qualifying ownership interest in a corporation or partnership that operates a QOZB in a QOZ or certain tangible property of a QOF that is used in a business in the QOZ. To be a qualifying ownership interest, (i) the interest must be acquired after December 31, 2017, solely in exchange for cash, (ii) the corporation or partnership must be a QOZB, and (iii) for 90% of the holding period of that interest, the corporation or partnership must be a QOZB. In keeping with these requirements, a QOZB may be in the form of:

- Qualified Opportunity Zone Stock ("QOZS"),
- a Qualified Opportunity Zone Partnership Interest ("QOZPI"), or
- Qualified Opportunity Zone Business Property ("QOZBP").[107]

Note, a QOF is not considered QOZP, nor is working capital or cash.

a. Qualified Opportunity Zone Stock ("QOZS")

QOZS is original issue stock of a domestic corporation acquired after December 31, 2017, directly or through an underwriter from the corporation, solely in exchange for cash. The corporation must be a QOZB at the time of issue (or was being organized as such if newly formed), and for substantially all the fund's holding period[108]. Stock acquired by a QOF will not be considered QOZS if, at any time during the four-year period beginning on the date two years before the issuance of the stock, the corporation issuing the stock purchased (directly or indirectly) any of its stock from the QOF or from a person related to the QOF.

b. Qualified Opportunity Zone Partnership Interest ("QOZPI")

A QOZPI is any capital or profits interest in a domestic partnership acquired after December 31, 2017, by a QOF from the partnership, solely in exchange for cash.[109] The partnership must be a QOZB at the time of acquisition (or be organized as such if newly formed), and for substantially all of the fund's holding period.

c. Qualified Opportunity Zone Business Property ("QOZBP")

QOZBP is tangible property used in a trade or business of a QOF or in a QOZB, if:

- it is used in a trade or business of the QOF or in a QOZB; and
- the property is purchased by the QOF after December 31, 2017; and
- the original use of the property commenced with the QOF or QOZB, or it was "substantially improved" by the QOF or QOZB; and
- during "substantially all" of the time the QOF or QOZB held the property, substantially all of the use of the property was in a QOZ or QOF's holding period

For purposes of the foregoing, "original use" occurs when the property is first placed in service in a manner that would start depreciation or amortization if the property were being used in a trade or business. Original use is satisfied if the property has not previously been placed in service in the QOZ, including existing property that has already been placed in service outside the QOZ. In addition, "substantially all" of the time is generally understood to mean at least 70 percent. The final regulations also provide the necessary parameters for "substantial improvement" to satisfy the requirements for QOZP. Specifically, tangible property is deemed substantially improved by a QOF only if, during any 30-month period beginning after the date of acquisition of the property, the total value of additions made by the QOF to the basis of the property exceed the adjusted basis of the property at the beginning of the 30-month period.

The final regulations provide additional guidance for the "substantial improvement" test with regard to existing structures, as follows: (1) if a QOF purchases an existing building on land

[106] Treas. Reg. §1.1400Z-2(d)-1(a)(1).

[107] Code §1400Z-2(d)(2), Treas. Reg. §1.1400Z-2(d)-2(a).
[108] Code § 1400Z-2(d)(2)(B); Treas. Reg. §1.1400Z-2(d)-1(c)(2).
[109] Code § 1400Z-2(d)(2)(C).

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located in a QOZ, the original use of the building is not considered to have commenced on the purchase date if not placed into service for purposes of depreciation[110]; (2) if a QOF purchases an existing building and land in a opportunity zone, substantial improvement to the building is measured by the QOF's additions to the adjusted basis of the building and not by additions to the adjusted basis in the building and the land[111]; and (3) measuring a substantial improvement to the building by additions to the adjusted basis in the building does not require the QOF to substantially improve the land on which the building is located[112].

Leased property may also qualify as QOZBP if the lease and its terms are market rate, and the lease is made after December 31, 2017, between unrelated parties. There must also be no prepayment under the lease which exceeds 12 months, and if the leased property was previously used in the QOZ, the business must purchase new tangible property to use in the QOZ equal in value to the leased property before the earlier of the last day of the lease term or 30 months after the of tangible personal property under the lease.

3. Qualified Opportunity Zone Business.

In order for a corporation or partnership to issue qualified stock or partnership interests to a QOF, the entity must be a Qualified Opportunity Zone Business ("QOZB"). To be a QOZB, the business must meet the requirements described below:

a. Substantially All Requirement (70 percent Test)

A QOZB is a trade or business in which "substantially all" (70 percent or greater) of the tangible property owned or leased by it is QOZBP.[113] The following rules apply for purposes of determining whether "substantially all" of the tangible property owned or leased by a QOZB is QOZBP[114]:

- If the corporation or partnership (entity) that is a qualified QOZB has an applicable financial statement, then the value of each asset of the entity as reported on the entity's applicable financial statement for the relevant reporting period is used for determining whether a trade or business of the entity satisfies the 70 percent requirement;
- If the entity does not have an applicable financial statement and a taxpayer both holds an equity interest in the entity and has self-certified as a QOF, then that taxpayer may value the entity's assets using the same methodology that the taxpayer uses for determining its own compliance with the 90-percent asset requirement (the compliance methodology), provided no other equity holder in the entity is a "Five-Percent Zone Taxpayer"[115]; and
- If two or more taxpayers that have self-certified as QOFs hold equity interests in an entity without an applicable financial statement and at least one of them is a Five-Percent Zone Taxpayer, then the values of the entity's assets may be calculated using the compliance methodology that both is used by a Five-Percent Zone Taxpayer and that produces the highest percentage of QOZBP for the entity.

Note that the 70 percent requirement gives QOFs an incentive to invest in a QOZB rather than directly owning QOZBP, as QOZBP interests must constitute at least 90% of the property of a QOF but only 70% of the tangible property of a QOZB need be QOZBR.

b. Active Conduct of Business Requirement (50 percent Test)

The QOZB must derive at least 50 percent of its total gross income from the active conduct of the business in the QOZ. Gross income derived from amounts treated as reasonable working capital under the safe harbor described below is counted toward the 50 percent requirement. Further, the regulations provide three safe harbors which a business may use to meet this test and which consider any of the following: (i) whether at least half of the aggregate hours of service received by the business were performed in a QOZ; (ii) whether at least half of the aggregate amounts that the business paid for service were for services performed in a QOZ; or (iii) whether necessary tangible property and

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[110] Treas. Reg. §1.1400Z-2(d)-2(b)(3)(i).
[111] Treas. Reg. §1.1400Z-2(d)-2(b)(4)(iii).
[112] Treas. Reg. §1.1400Z-2(d)-2(b)(4)(iv).
[113] Code §1400Z-2(d)(3)(A).
[114] Treas. Reg. §1.1400Z-2(d)-1(b).
[115] Treas. Reg. §1.1400Z-2(d)-1(b)(2)(ii)(B). A Five-Percent Zone Taxpayer is a taxpayer that has self-certified as a QOF and holds stock in the entity representing at least 5 percent in voting rights and value or holds an interest of at least 5 percent of the profits and capital interest of the entity (if it is a partnership)

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necessary business functions to earn the income were located in a QOZ[116].

c. Substantial Portion of Intangible Property Used in QOZ

A substantial portion of intangible property of an QOZB must be used in the activity conduct of a zone business. This requirement will be met during any period that the safe harbor for working capital described below applies.

d. Less Than 5 percent Nonqualified Financial Property and Working Capital Safe Harbor

Less than 5 percent of the average of the aggregate unadjusted bases of property held by the QOZB may be attributable to nonqualified financial property. A safe harbor is provided in the statute, whereby reasonable amounts of working capital held in cash, cash equivalents or debt instruments with a term of 18 months or less is excluded from the definition of nonqualified financial property, provided certain requirements are met[117].

Specifically, the working capital safe harbor allows a QOZB to hold cash, cash equivalents or debt instruments for a period not longer than 31 months. The safe harbor is satisfied if:

1) A written document designates the amounts for the acquisition, construction or substantial improvement of tangible property in a QOZ; and
2) A written schedule consistent with the ordinary start-up of a trade or business requires that the working capital assets be spent within 31 months of receipt by the business; and
3) The working capital is actually spent in a manner that is substantially consistent with the acquisition, construction or substantial improvement of tangible property.

The safe harbor is provided presumably because deploying capital to develop a new business or the construction or rehabilitation of real estate may take longer than the six-month rule under the 90 percent investment test that applies to the first year of a QOF.

e. "Sin" Businesses Do Not Qualify

The QOZB cannot include the operation of a private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack, gambling or a store whose principal business is the sale of alcohol for consumption off premises.[118]

4. Geographic Limitations

A partnership or corporation not organized in the U.S., the District of Columbia or a U.S. possession is ineligible to be a QOF. A partnership or corporation organized in a U.S. possession is eligible to be a QOF only if it is organized for the purpose of investing in QOZP that relates to a trade or business operated in the possession in which it is organized.[119] Likewise, an equity interest in a partnership or corporation organized outside of the U.S., the District of Columbia or a U.S. possession will not qualify as a QOZS or a QOZPI.

5. Penalty For Failure to Meet 90 Percent Test.

As noted above, a QOF must pay a penalty for each month it fails to hold at least 90 percent of its assets in QOZP, unless the failure is due to reasonable cause. The amount of penalty is calculated as the:

- excess of 90 percent of its aggregated assets over the aggregate amount of QOZP held,
- multiplied by the underpayment rate under Code § 6621(a)(2) for that month.

C. RELATED PARTY RESTRICTIONS

An important guardrail in structuring QOF investments concerns compliance with the related party rules. To begin with, the initial capital gain that is to be deferred by investment in a QOF must be derived from a sale of assets of any type to an unrelated person. Secondly, the QOZBP purchased with proceeds of a QOF investment must also be from an unrelated person. Both of these "related party" tests are measured using a 20 percent threshold of related party ownership. Specifically, 20 percent or more direct, indirect or attributed common ownership constitutes a related party for purposes of these rules. Therefore, capital gain generated by a sale of assets to an entity with a 21 percent common ownership does not qualify as a qualifying capital gain for

[116] Prop. Treas. Reg. §1.1400Z-2(d)-1(d)(3)(vi).
[117] Prop. Treas. Reg. §1.1400Z-2(d)-1(d)(3)(iv); Code § 1397C(b)(8).
[118] Treas. Reg. §1.1400Z-2(d)-1(d)(4).
[119] Treas. Reg. §1.1400Z-2(d)-1(a)(1)(ii).

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deferral purposes, and the purchase of assets held by a related party would not constitute QOZBP.

D. CHANGES DURING 2025 AND CURRENT STATUS

Notwithstanding the foregoing, the One Big Beautiful Bill Act (the "OBBBA"), signed into law on July 4, 2025, made significant changes to the QOZ program, including making the program permanent and introducing new provisions intended to better target distressed and encourage rural investments.

The OBBBA eliminated an original sunset clause which would have ended new investments on December 31, 2026. However, the current OZ designations are now due to expire on December 31, 2026, with a new set of zones to take effect beginning January 1, 2027. Governors will then be able to redesignate zones every 10 years (rather than the one-time designation in place prior to enactment of the OBBBA), thereby creating a rolling investment period for OZ investors.

In addition, the definition of a "low-income community" was tightened, to now require a median family income of no more than 70 percent of the applicable state or metro area median (reduced from 80 percent). Further, the "contiguous tract" rule was repealed, pursuant to which governors could previously designate relatively affluent tracts simply because they are located adjacent to a low-income community. While an alternative poverty rate of 20 percent or more remains, it is supplemented and modified by an "anti-gentrification" trigger which disqualifies applicable census tracts if median family income exceeding 125 percent of the applicable state or metropolitan area median family income, even if it satisfies the basic poverty rate test. As such, OZs must now generally exclude areas with very high median family incomes, to prevent gentrification. Collectively, these changes are anticipated to reduce the number of eligible census tracts by 20 to 30 percent. Further, QOFs and QOZBs now face new, detailed Internal Revenue Service reporting requirements regarding assets, investments, and economic impact metrics (including job creation, housing units, and asset values), with significant penalties imposed for non-compliance.

For investments made after December 31, 2026, capital gains can now be deferred for a rolling five-year period from the date of investment, rather than having a fixed end date. The original 10% (five-year) and 15% (seven-year) basis step-ups that were in place under the QOZ program prior to OBBBA changes have now been replaced with a single 10 percent basis step-up after a five-year holding period for standard OZs.

In addition, new incentives were introduced for investments in "Qualified Rural Opportunity Funds" ("QROFs"), with at least 33 percent of newly designated QZs to be located in rural census tracts, as defined in the Consolidated Farm and Rural Development Act. These incentives include a 30 percent basis step-up after five years, and a reduced substantial improvement requirement (from 100 percent to 50 percent of the property's adjusted basis). For investments made after January 1, 2027, the capital gain deferral period is a rolling five years from the date of investment, rather than a fixed end date. Moreover, appreciation on initial investment in QOFs or QROFs after a 10-year period and upon exit may be excluded completely, including gain that would be subject to depreciation recapture.

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OTHER FEDERAL CREDITS, INCENTIVES AND CLASSIFICATIONS

BY THOMAS D. GLASCOCK

A. WORK OPPORTUNITY TAX CREDIT

The Work Opportunity Tax Credit ("WOTC") is a Federal tax credit available to employers to provide an incentive to hire individuals from certain target groups who experience significant employment barriers (that is, experiences high unemployment rates or which has other special employment needs). The WOTC is available for wages paid to qualifying individuals who begin work on or before December 31, 2025. These credits are not conditioned on an employer's presence in an Empowerment Zone nor are most of the qualifying employees required to live in the Empowerment Zone. In certain circumstances, successor employers may claim a pro-rated portion of this credit for employees hired by a previous employer. However, the definition of "successor employer" appears to be limited to situations where an asset purchase has taken place, rather than a stock purchaser or a merger.[120]

As described below, these credits may only be secured where employees are properly certified prior to, in conjunction with or immediately after being hired.[121]

1. Overview

The WOTC is a general business credit provided under section 51 of the Internal Revenue Code, permitting employers to claim a credit for "qualified first year wages" to targeted groups of employees, including certain low-income workers, veterans, long-term family assistance recipients, ex-felons and others. Each target group has certain requirements that must be met for the employee to be eligible for WOTC purposes. Taxable employers claim the WOTC against income taxes, whereas eligible tax-exempt employers can claim the WOTC only against payroll taxes and only for wages paid to eligible employees. The qualified first year wages must be paid within the first year worked, and each employee must be certified within a targeted group prior to, in conjunction with or immediately after being hired. The amount of credit available is 40 percent of the first $6,000.00 of wages paid to employees working more than 400 hours, or a maximum amount of $2,400.00. Employees working between 120 and 400 hours may earn a 25 percent credit, or a

[120] The legislative authority for the Work Opportunity Credit has expired. However, Congress may retroactively reauthorize the credit back to the date of expiration, as it has done in the past.

[121] Employers should continue to submit applications for Working Opportunity Credits to State Workforce Agencies in anticipation of this retroactive reauthorization.

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maximum amount of $1,500.00. An employer cannot claim the WOTC for employees who are rehired, and wages claimed for these credits may not be used to claim the Empowerment Zone Employment Credit.

The Small Business and Work Opportunity Tax Credit Act expanded the definitions of certain targeted groups, with the qualified veterans group expanded to include veterans entitled to compensation for a service-connected disability and who, during the one-year period ending on the hiring date, were (a) discharged or released from active duty in the U.S. Armed Forces or (b) unemployed for a period or periods totaling at least six months. The maximum amount of first-year wages taken into account for these disabled veterans is $12,000 (for veterans discharged or released from active duty, for a maximum credit of $4,800), and $14,000 (for veterans unemployed at least six months, for a maximum credit of $5,600). Additionally, the high-risk youth group was renamed "designated community residents," and it was expanded to include individuals who are at least age 18 but not yet age 40. In addition, residents of rural renewal counties were added to this group.[122]

Furthermore, the Protecting Americans from Tax Hikes Act of 2015 (the "PATH Act") expanded the group of "targeted individuals" to include a qualified long-term unemployment recipients target group (as defined in § 51(d)(15) of the Internal Revenue Code), and it extended the WOTC through December 31, 2019. Employers who hired these targeted employees on or after January 1, 2016, and on or before August 31, 2016, may be eligible to receive a tax credit.[123] The Consolidated Appropriations Act of 2021 authorized a further extension of the WOTC until December 31, 2025.[124]

2. Vow to Hire Heroes Act

The VOW to Hire Heroes Act of 2011 (the "Act") provides an expanded Work Opportunity Credit to businesses that hire eligible unemployed veterans, including veterans with service-related disabilities. The Act enables employers, including qualified tax-exempt organizations, to claim the credit for qualified veterans who begin work on or after November 22, 2011, and before January 1, 2014.[125] The credit is calculated at 40percent of the first $14,000 of wages or up to $9,600 per veteran for for-profit employers, and up to $6,240 for tax-exempt organizations, with the actual amount depending on various factors (including, but not limited to, the length of unemployment, the hours worked and first-year wages). It is applied dollar-for-dollar against taxes owed, and it can be carried forward up to 20 years. The Act also provides up to $9,600 for companies that hire Post-9/11 veterans with service-connected disabilities who have been looking for work for more than six months. As stated, the credit may be claimed by qualified tax-exempt organizations, against its share of social security tax by filing of a Form 5884-C.

Changes to the WOTC during 2025 and Current Status

Notwithstanding the foregoing, during 2025, the WOTC was significantly modified by several legislative and administrative revisions directly impacting (or expanding upon) the original goals of the Act, particularly as they relate to veteran employment and related tax credits. Tax incentives originally established by the WOTC were subject to significant review and legislative action.

The above said, the WOTC was set to expire on December 31, 2025, pursuant to the Consolidated Appropriations Act of 2021. Consequently, the credit has entered into a temporary hiatus (as has happened before) while Congress considers, among other things, the availability and scope of the tax credits. If revived by contemplated new legislation, it is anticipated to extend the credit through 2030, increasing the credit percentage from 40 percent to 50 percent of qualified first-year wages and indexing the credit to inflation. Proposed changes would also expand eligibility to include military spouses (a category not previously covered under the Act), and the removal of age restrictions (18 to 40) for recipients of Supplemental Nutrition Assistance Program (SNAP) benefits.

In addition, The Veterans Employment Readiness Yield (VERY) Act of 2025 was passed by the House in an effort to “modernize” the language to the Veteran Readiness and Employment (VR&E) program. Outdated terms, such as "employment handicap" and "serious employment handicap", were replaced by new terminology, including "employment barrier(s)" and "serious employment barrier(s)". While H.R. 3579 mandates

[122] See the instructions to the IRS Form 8850.

[123] Note, the time frame within which hired workers are eligible is one year shorter for long-term unemployment recipients than for other "targeted individuals".

[124] Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (2020),

[125] As noted in the previous footnote, an employer should continue to apply for these credits despite the fact that the legislative authority for these credits has, at the time this section was written, expired.

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new requirements for Veterans Administration reporting on, among other things, the average time it takes for veterans to meet with a counselor and the annual wages of veterans before and after completing the program. Further, additional legislation introduced during 2025 would facilitate veteran employment at the federal and state levels, including the Hire Veterans Act (H.R. 1242) and the Protect Veteran Jobs Act (H.R. 1637).

New York State Senate Bill 2025-S910 would also establishes a state-specific returning veterans tax credit worth up to $3,000–$4,000 per hire, thereby supplementing federal incentives. In addition, released by the U.S Department of Labor in July 2025, the Veterans Accommodations Toolkit provides guidance for employers, to support disabled veterans with reasonable accommodations and apprenticeship programs.

B. HUBZONE CLASSIFICATIONS

The Small Business Reauthorization Act of 1997 created the HUBZone Empowerment Contracting Program in order to provide Federal contracting assistance for qualified small business concern ("SBCs") located in historically underutilized business zones in an effort to increase employment opportunities, investment and economic development in such areas.[126] The program is administered by the Small Business Administration ("SBA"),

A "HUBZone" is a Historically Underutilized Business Zone. HUBZones include qualified census tracts, qualified non-metropolitan counties with median household incomes of less than 80 percent of the state median household income or with an unemployment rate of at least 140 percent of the statewide average or the national average (whichever is less), and lands within the boundaries of federally recognized Indian reservations. In order to qualify as a HUBZone Small Business Concern ("HUBZone SBC"), a business must: (1) qualify as a small business under applicable SBA regulations, (2) be at least 51 percent unconditionally and directly owned and controlled by U.S. citizens (or by certain entities such as Community Development Corporations or small agricultural cooperatives), (3) maintain its principal office in a HUBZone, and (4) maintain a workforce, at least 35 percent of which reside in a HUBZone. Further, to be awarded contracts under the program, a HUBZone SBC must first be certified by the SBA.[127] A HUBZone SBC must also recertify its eligibility annually by representing to the SBA that it still meets the above-described criteria. Further, the Small Business Reauthorization Act sets as a goal that at least 3 percent of HUBZone Federal prime contracts be awarded to HUBZone-certified small businesses.

The following represents a non-exclusive list of the types of contracts that eligible HUBZone SBCs may receive: (1) set-aside contracts, (2) sole source HUBZone contracts and (3) full and open competition contracts.

Further, entities that receive Federal grant moneys to complete a project in a HUBZone should be aware that they may be required to hire HUBZone SBCs or other federally preferred businesses as a certain percentage of the employed contractors.

Changes to the SBA's HUBZone program during 2025 and Current Status

The SBA's HUBZone program experienced significant changes during 2025, with many becoming effective on January 16, 2025. These changes appear intended to provide greater flexibility for small businesses, while also strengthening oversight and compliance. They include a requirement for triennial recertification (with HUBZone firms now only required to recertify every three years, instead of annually), and a certification at offer time requirement (with firms now required to certify their HUBZone eligibility at the time of their initial offer, including price, for a specific contract), rather than relying solely on their annual status. In addition, an individual is now considered a HUBZone "employee" if they work at least 10 hours per week during the four-week period preceding eligibility determination, and the duration an employee must live in a HUBZone to count toward the 35 percent residency threshold was shortened from 180 days to 90 days. Further, firms that win a HUBZone contract now have a 12-month rolling grace period from the award date to bring their residency level back up to the required 35 percent.

The above said, stricter residency documentation is now required, with the SBA removing voter registration cards (which lack issuance dates) as an acceptable proof of residency, in favor of driver's licenses or other government identifications. Moreover, the SBA has increased oversight through unannounced audits, to ensure HUBZone

[126] 13 C.F.R. §126.100.
[127] The application can be completed online at www.sba.gov.

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employees are performing substantive work rather than just appearing on payroll.

Specific HUBZone Map classification changes also occurred, with (i) new Governor-designated covered areas and Qualified Disaster Areas (QDAs) permitted to be added throughout the year, as appropriate, (ii) governors permitted to select all eligible areas that meet the criteria for a governor-designated HUBZone (thereby removing a previous 10 percent annual cap), and (iii) removal of the prior 20 percent cap previously applied by HUD in selecting QCTs for HUBZone designation, to increase the number of possible eligible areas.

C. EB-5 DIRECT FOREIGN INVESTMENT - REGIONAL CENTERS

The EB-5 program was created in 1990 to stimulate the U.S. economy through job creation and increased capital investment by foreign investors, by permitting foreign nationals and their immediate family members to be eligible for conditional permanent resident status in exchange for their investment in qualifying businesses which create jobs for full-time U.S. workers. As such, 2 main objectives of the program are (1) to encourage foreign investments into US commercial enterprises and (2) to create American jobs. By making a qualified investment, a qualified foreign investor can receive a permanent visa (green card) for themselves, their spouse and unmarried children under 21-years old.

Following March 15, 2022, EB-5 investments must be in an amount of not less than $1.8 million in an approved commercial enterprise. They can be made directly by an individual or through a designated Regional Center (that is, a private enterprise or corporation or a regional government agency with a targeted investment program within a defined geographic area). If the investment is made in a targeted employment area (a TEA) that is either a rural area or an area with high unemployment (an area with an unemployment rate at least 150 percent of the U.S. national average), the minimum investment is reduced to $900,000. Each investor's investment must create at least 10 full-time jobs for U.S. workers. Regional Center projects, on the other hand, can receive credit for both direct and indirect job creation, and Regional Centers can pool individual investments and invest in particular projects. Currently, in New York State, there are 97 approved EB-5 Regional Centers, each servicing different geographic areas in NYS and different approved North America Industry Classification Systems (NAICS)/industries.[128]

To the business owner/developer, EB-5 funding can offer a lower cost form of capital investment than alternatives because investor demand for return on their investment is often lower for EB-5 capital than other sources of capital. In addition, securing EB-5 capital increases the overall liquidity of a business project which, in turn, reduces the costs of acquiring capital from other sources.

If an investor decides to invest through a Regional Center, they are relieved of both the need to manage the business and of the job creation requirement. The foreign investor will therefore not have to play an active role in the business, nor will they have to have any direct role in managing the investment. Instead, the Regional Center runs the project, and it is held responsible for creating the 10 new (either direct or indirect) jobs per investor, which must be held until the end of the investor's 2-year conditional permanent residence. The investor receives conditional permanent resident status (a green card) during the investment phase, and then applies for full unconditional status upon proof that the investment was made and at least 10 jobs were created.

Each Regional Center has their specific targeted investment areas. For example, some Centers are solely interested in Retail investments/tourism-related projects or manufacturing, whereas other Centers are only interested in real estate-related projects. The EB-5 program therefore presents a potentially significant source of alternative investment for certain American businesses.

In addition to the EB-5 programs, foreign investors in U.S. enterprises have been accommodated under the E visa "Treaty Investor" program and the L-1 "Intracompany Transferee" option, neither of which require the investor to meet a minimum investment or job creation threshold.

Changes to the EB-5 program during 2025 and Current Status

During 2025, the EB-5 program experienced stricter oversight in the form of increased audits, mandatory project site visits, and enhanced disclosure requirements for marketing fees paid to third-party promoters, with an emphasis on regional center compliance.

[128] Further detail and contact information for each regional center can be found at https:/iiusa.org/en/regional-center-members.

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In keeping with this, during January 2025, many Regional Centers experienced termination of their designation for failure to pay mandatory annual "Integrity Fund" fees (that is, $10,000 or $20,000, depending on size). Likewise, the U.S. Citizenship & Immigration Services ("USCIS") began issuing termination notices to Regional Centers during September 2025, for failure to comply with new integrity measures, such as mandatory audits and background checks on principals.

Minimum investment remained at $800,000 for TEAs and $1,050,000 for non-TEA projects, but future increases were codified based on inflation adjustments. Minimum thresholds are projected to rise significantly on January 1, 2027, with the TEA required minimum expected to increase to between $900,000 and $975,000.

The Regional Center Program's current authorization expires on September 30, 2027. However, investments remain permanently authorized, and not subject to sunset. That said, investors are encouraged to file petitions for the program (that is, the preparation and filing of a Form I-526 or Form I-526E, depending on the type of investor) before September 30, 2026, to be "grandfathered" against any future program lapses.

In addition, during November 2025, the USCIS commenced to a formal notice-and-comment rulemaking process with its publication of Notice of Proposed Rulemaking (NPRM) in the Federal Register, intended to address such issues as the sustainment period, or the length of time capital must remain invested. Further, reserved categories (i.e., 20 percent Rural, 10 percent High Unemployment, 2 percent Infrastructure) remain a critical tool to expedite the process for investors from countries currently experiencing wait times, such as China and India.

D. LOW-INCOME HOUSING TAX CREDIT ("LIHTC")

The Low-Income Housing Tax Credit (LIHTC) Program was created by the Tax Report Act of 1986 (P.L. 99-514), and is an indirect Federal subsidy used to finance the development of affordable rental housing for low-income households with the LIHTC codified in Section 42 of the Internal Revenue Code. Though a Federal tax incentive, the program is primarily administered by state housing finance agencies (HFAs) through federally required but state-created qualified allocation plans ("QAPs"). These plans award tax credits to developers of qualified projects in exchange for agreeing to reserve a fraction of rent-restricted units for lower-income households (with a priority given to projects that serve the lowest-income households and that remain affordable for the longest period of time). LIHTCs at the 9 percent credit rate (as described below) are first allocated to each state according to its population; conversely, the state allocation limits do not apply to the 4 percent credits, which are automatically eligible for tax-exempt bond financed projects.

Upon receipt of a LIHTC award, developers can sell these credits to investors to raise equity capital for their projects, which reduces the debt that the developer would otherwise have to borrow. The "sale" of credits occurs within a partnership that legally binds the two parties to satisfy the Federal tax requirements that the tax credit claimant have an ownership interest in the underlying property. Because the debt is lower, a tax credit property can in turn offer lower, more affordable rents. Provided the property maintains compliance with the program requirements, investors receive a dollar-for-dollar credit against their Federal tax liability each year over a period of 10 years once the property is "placed in service" (meaning that it is completed and available for rent). The amount of the annual credit is based on the amount invested in the affordable housing project; however, properties located in difficult development areas (DDAs) or qualified census tracts (QCTs) are eligible to receive a "basis boost" permitting LIHTCs at 130 percent (rather than the normal 100 percent) of the project's eligible basis, permitting the available credits to be increased by up to 30 percent. Moreover, an HFA may classify any LIHTC project that is not financed with tax-exempt bonds as difficult to develop, and therefore eligible for a basis boost.

Projects eligible for LIHTCs include rental housing located in multifamily buildings, single-family dwellings, duplexes and townhouses.

Basic Eligibility Requirements

To be eligible for consideration under the LIHTC Program, a proposed project must satisfy the following 4 basic requirements:

1. Residential Rental Property: The LIHTC program requires that a project be a new construction or that rehabilitation be performed, if the developer is acquiring an existing building. Tax credits may be earned on the acquisition of an existing development provided the owner meets the 10-year previous ownership rule. This rule states that the property to be acquired must not have changed ownership and been placed in service during a 10-year period prior to the acquisition. A building that has not been used in 10 or more years

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can claim the acquisition credit even if its ownership has changed, given that it has not been placed in service during that period.

2. Occupancy Threshold Requirements: Projects eligible for housing tax credits must meet low-income occupancy threshold requirements pursuant to an "income test" and a "gross rents test". Therefore, project owners must irrevocably elect one of the following three thresholds:

(i) 20-50 Test: At least 20 percent of the units must be rent-restricted and occupied by households with incomes at or below 50 percent of the HUD-determined area median income (adjusted for household size).

(ii) 40-60 Test: At least 40 percent of the units must be rent-restricted and occupied by households with incomes at or below 60 percent of the HUD-determined area median income (adjusted for household size).

(iii) Average Income Test: At least 40 percent of the units have imputed income designations that average 60 percent or less of the HUD-determined area median income ("AMI", adjusted for household size) and the households living in those units must meet the income designation for their respective units. Moreover, no individual unit can have income exceeding 80 percent of the AMI. If the household of a unit fails to meet the applicable income limit, then an additional unit can be removed from the applicable fraction for determining the LIHTC or its imputed income designation is reduced to get below the 60 percent threshold.

State QAPs typically encourage applicants to provide more than the minimum number of affordable units, and to provide greater than the minimum level of affordability. Moreover, credits are available only for the affordable units, with individual income levels certified by each property manager.

3. Rent Limit Restrictions: A project must also meet a "gross rents test" such that rent (adjusted for bedroom size) does not exceed 30 percent of the 50 percent or 60 percent of AMI threshold, depending on which income test the project elects to satisfy. The rent for each unit is established so that tenant monthly housing costs, including a utility allowance, do not exceed the applicable LIHTC rent limit. These limits are based on a percentage of AMI, as adjusted by unit size. Also, rents cannot exceed local market limits. However, the LIHTC Program restricts only the portion of the rent paid by the tenant, not the total rent. As a result, certain rental assistance programs can be used to raise the total rent above the LIHTC rent limit. For example, project-based Section 8 contract rents can exceed the LIHTC limit, but tenant-based Section 8 contract rents cannot.

4. Affordability Requirements: The LIHTC program requires a minimum affordability period of 30 years (i.e., a 15-year compliance period and a subsequent 15-year extended use period). Some states require a longer affordability period for all LIHTC properties, and other states may negotiate longer affordability periods on a property-specific basis. Tenant incomes are recertified annually to ensure their continued eligibility. The allocating agency is responsible for monitoring compliance with the provisions during the affordability period and must report the results of monitoring to the IRS.

LIHTC Rates

As indicated above, there are two tax credit rates: 9 percent and 4 percent:

1. 9 percent credit rate. New construction and substantial rehabilitation projects that are not subsidized by the Federal government through volume-cap multi-family tax-exempt bonds or otherwise can earn credits at a rate of approximately 9 percent of qualified basis each year for a 10-year period. For this purpose, "substantial rehabilitation" means rehabilitation with a cost at least equal to the minimums established by LIHTC regulations. As such, 9 percent credits may be used to subsidize rehabilitation costs, but not acquisition costs. "Federal funds," as defined in the LIHTC regulations, includes a loan or obligation of "Federal funds" where the interest rate on the loan or obligation is less than the prevailing Treasury interest rate. Thus, if HOME funds are loaned to the project at or above the Applicable Federal Rate, they are not treated as "Federal funds" for LIHTC purposes. The 9% credit is commonly referred to as the "competitive credit", as awards are drawn from a state's annual LIHTC allocation authority with developers competing for an award.

2. 4 percent credit rate. The 4 percent rate applies to (i) acquisition of eligible, existing buildings, (ii) Federally subsidized new construction or rehabilitation projects, and (iii) all eligible basis in projects that are financed through the issuance of volume-cap multi-family tax-exempt bonds, with the associated LIHTCs sometimes

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called "as of right" credits (or “non-competitive” or “automatic” credits) because they are automatically attached to the volume-cap bonds.

The 4 percent and 9 percent credit rates are approximations of the actual rates with the U.S. Department of Treasury using a formula incorporating three factors (the credit period length, the desired subsidy level and the current interest rate) to determine the credit rates required to produce a 30 percent subsidy for a 4 percent credit or a 70 percent subsidy for a 9 percent credit, with the exact credit rates published monthly by the Treasury Department to reflect changes in the market interest rates. Once the credit rate is determined, it is multiplied by the developer’s qualified basis to determine the amount of LIHTC a project will receive each year for 10 years. Thus, each LIHTC project locks in a tax credit rate at the time the allocating agency makes a binding commitment or at the time the project is placed in service (with the developer choosing which time to lock the rate).

Calculating Qualified Basis

There are four steps involved in calculating the qualified basis:

Step 1: Determine Eligible Basis. Eligible basis is the amount of all depreciable development costs that may be included in the calculation of housing tax credits. Eligible depreciable costs include all hard costs (i.e., construction costs) and most depreciable soft costs (i.e., architectural and engineering costs, soil tests and utility connection fees). Excluded costs include acquisition costs for land, permanent financing costs and reserve deposits. Note, Federal grants reduce the eligible basis amount**.**

Step 2: Determine Applicable Fraction. The applicable fraction is the lower of 2 percentages: (i) the percentage of affordable units to total units, and (ii) the percentage of square feet in the affordable units to the total square feet in the project. At the time each building is first occupied ("placed in service"), the developer and IRS establish a minimum “Applicable Fraction” for that building which the developer must maintain for the entire affordability period.

Step 3: Determine Qualified Basis. Qualified basis is the product of eligible basis times the applicable fraction, and it refers to the dollar amount that is eligible for housing tax credits.

Step 4: Basis Boost Adjustment. If the development is located in a HUD-designated high-cost area (HCA), the state allocating agency may award up to 30 percent additional LIHTCs. These areas include both Qualified Census Tracts (“QCTs”) and Difficult Development Areas (“DDAs”).

Syndication

Developers may claim housing tax credits directly, but most monetize the tax credits to raise equity capital for their housing project. The developer can sell the tax credits either (i) directly to an investor, or (ii) to a syndicator, who assembles a group of investors and acts as their representative. The credit investor becomes an equity owner in the property ownership entity (typically, either a limited partnership or a limited liability company), in which the credit investor frequently holds a 99 percent non-managing investor member equity interest and the developer-sponsor entity holds the 1 percent general (managing) member interest. The partnership (or operating) agreement addresses, among other terms, the allocation and distributions of profits, losses and LIHTCs.

Allocating Housing Tax Credits

Each year, the IRS allocates housing tax credits to designated state agencies - typically state housing finance agencies - which in turn award the credits to developers of qualified projects. For 9 percent credits, each state is limited to a total annual housing tax credit allocation of $2.90 per resident, with only the first year of the 10 years of tax credits counting against the allocation. Beginning in 2003, this limit is adjusted for inflation. States allocate housing tax credits through a competitive process. The state allocating agency must develop a Qualified Allocation Plan (QAP) for allocating the credits consistent with the state’s Consolidated Plan. Federal law requires that the allocation plan give priority to projects that (a) serve the lowest income families, and (b) are structured to remain affordable for the longest period of time. Federal law also requires that 10 percent of each state’s annual housing tax credit allocation be set aside for projects owned by nonprofit organizations. The credit amount for a project is calculated based on the costs of development and the number of qualified low-income units and cannot exceed the amount needed to make the project feasible. A state has two years to award housing tax credits to projects. Tax credits not awarded in a year may be carried forward to the next year. If a state is unable to use its tax credits over a 2-year period, they are returned to a national pool for re-allocation among the states on a use-it-or--lose it basis. If a state awards tax credits to a project that is not completed and the tax credits are returned, the state has an additional two years to award the tax credits to another project within that state. To be eligible for an excess credit allocation, a state must have allocated its entire previous allocation of tax credits. Once a developer receives an allocation, it generally has two years to complete the project, with credits not eligible use until the property is placed in service.

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Example: The Value of Housing Tax Credits

A developer proposes to use LIHTCs to construct 70 units of low-income rental units. No other Federal funds will be used, so the project is entitled to the 9 percent credit. The development will not be located in either an OCT or a DDA, so no basis boost is allowed. 40 percent of the units and 40 percent of the square footage will be set-aside for income- and rent-restricted households. The total development costs for the project are as follows:

Land acquisition	1,000,000
Construction	3,400,000
Architectural	500,000
Eligible soft costs	100,000
Total:	5,000,000

The amount of LIHTC equity that could be generated from this project is calculated as follows:

Eligible Basis = $4,000,000 (Total Development Costs - Land Cost)

Qualified Basis = $1,600,000 (Eligible Basis x Applicable Fraction: $4,000,000 x 40 percent)

Annual Credit = $144,000 ($1,600,000 x 9 percent Credit Rate)

Total Amount of Housing Tax Credits = $1,440,000 ($144,000 x 10 years)

Credit equity will equal $1,440,000, times the per credit pricing negotiated between the developer and the credit investor.

The present value of the $1,440,000 stream of tax credits is approximately $1,008,000, resulting in a 70 percent subsidy.

Credit Recapture

LIHTCs are earned over 15 years and claimed over 10 years. Accordingly, there is a portion of the credits being claimed in years 1-10 that has not yet been earned (that is, the accelerated portion of the credits). If a recapture event occurs, the accelerated credits would be lost in an amount proportional to the percentage of the property failing to operate as planned. Recapture occurs either through (i) a disposition of the building, (ii) a decrease in the qualified basis of a building from one year to the next [this occurs through a decrease in the applicable fraction of a building (affordable units or affordable square footage, whichever is lesser) to total number of units or total project square footage], or (iii) a decrease in eligible basis (most typically, the result of a casualty loss).

1. Disposition: The sale of an LIHTC property to a new owner can trigger recapture of the credits previously claimed by the original owner. But, if it is reasonably expected that the building will continue to be operated by the new owner as a low-income building for the remaining compliance period, there is no recapture of previously claimed credits.

2. Qualified basis reduction: A decrease in the applicable fraction of a building occurs when previously qualified units no longer qualify for the program. But owners and operators of low-income housing projects on which a credit has been claimed must correct any noncompliance with the set-aside requirement or with a reduction in qualified basis within a reasonable period after the noncompliance is discovered or reasonably should have been discovered. If any noncompliance is corrected within a reasonable period, there is no recapture. Note, the recapture caused by a decrease in applicable fraction recaptures only the portion of credit associated with the change in applicable fraction. If the building had a change in applicable fraction from 100 percent to 50 percent, for example, only half of the total potential cumulative recapture with interest would apply.

3. Decrease in eligible basis: A decrease in eligible basis typically occurs due to a casualty loss of some kind - a fire or other damage to some or all of the units in a building can cause a reduction of the basis of the building, and it can cause recapture of tax credits associated with the reduction of the basis. However, the owner has an opportunity to restore the property and avoid recapture if the damage is repaired within a reasonable time period not to exceed two years from the close of the year in which the casualty loss occurred. If the loss is not restored by then,

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credits cannot be claimed for that year, but there is no recapture of credits previously claimed.

4. The Recapture Cost: In years 1 through 10, two-thirds of the total credit amount claimed are deemed earned and one-third of the total credit amount claimed has the potential for recapture. In years 11 through 15, the potential for recapture decreases by one-fifth of the total accelerated credit amount claimed until, at the end of year 15, the potential for recapture is zero. Interest accumulates on recapture amounts from the due date of the tax return on which the credits were claimed. The interest rates charged by the IRS vary depending on the type of taxpayer claiming the credits.

Below is an example of a building with a total credit allocation of $10 million (that is, $1 million annually). To the last column must be added interest determined by the IRS, which would significantly increase the potential recapture amount.

Year	Credits Taken	Credits Earned	Cumulative Taken	Cumulative Earned	Potential Recapture
1	$1,000,000	$666,667	$1,000,000	$666,667	$333,333
2	$1,000,000	$666,667	$2,000,000	$1,333,333	$666,667
3	$1,000,000	$666,667	$3,000,000	$2,000,000	$1,000,000
4	$1,000,000	$666,667	$4,000,000	$2,666,667	$1,333,333
5	$1,000,000	$666,667	$5,000,000	$3,333,333	$1,666,667
6	$1,000,000	$666,667	$6,000,000	$4,000,000	$2,000,000
7	$1,000,000	$666,667	$7,000,000	$4,666,667	$2,333,333
8	$1,000,000	$666,667	$8,000,000	$5,333,333	$2,666,667
9	$1,000,000	$666,667	$9,000,000	$6,000,000	$3,000,000
10	$1,000,000	$666,667	$10,000,000	$6,666,667	$3,333,333
11	$-	$666,667	$10,000,000	$7,333,333	$2,666,667
12	$-	$666,667	$10,000,000	$8,000,000	$2,000,000
13	$-	$666,667	$10,000,000	$8,666,667	$1,333,333
14	$-	$666,667	$10,000,000	$9,333,333	$666,667
15	$-	$666,667	$10,000,000	$10,000,000	$0

Changes to the LIHTC program during 2025 and Current Status

During 2025, with the passage of the OBBBA, the LIHTC program underwent its most significant expansion in decades. Significant changes include a lowered Private Activity Bond (PAB) threshold, a permanent 12 percent increase in 9 percent LIHTC Allocations, a return of 100 percent Bonus Depreciation, the availability of a significant annual LIHTC equity investment capacity for Fannie Mae and Freddie Mac, and an increase in the LIHTC rehabilitation per-unit minimum. In addition, and helpful to the LIHTC program, the New Markets Tax Credit ("NMTC") program was made permanent. Conversely, the OBBBA caused a sunset of certain complementary energy credits.

Effective for properties placed in service after December 31, 2025, the threshold required to trigger 4 percent LIHTCs for tax-exempt private activity bond financing was reduced from 50 percent to 25 percent of a project's aggregate basis, making it significantly easier to qualify for these credits. To be eligible, at least 5 percent of the project's aggregate basis must be financed with bonds issued after December 31, 2025. While the OBBBA did not directly increase a state's overall bond volume cap, it now effectively allows states to finance up to twice as many LIHTC transactions with the same amount of bond volume, which can potentially double the number of 4 percent credit projects they can support. Further, beginning with the 2026 calendar year, every state received a permanent 12 percent increase in its annual 9 percent LIHTC, which is expected to facilitate the creation of more than one million additional affordable housing units. Further, for 2026, with a new 12 percent boost, the standard per-capita allocation was increased from $3.00 and a small-state minimum of $3,455,000 during 2025 to $3.416 per capita and a small-state minimum of $3,953,600 for 2026. Likewise, the LIHTC rehabilitation per-unit minimum was increased from $8,500 in 2025 to $8,700 for 2026.

Moreover, for property acquired and placed in service on or after January 19, 2025, the OBBBA also restored 100 percent bonus depreciation for qualified property (such as furniture, fixtures, equipment, and landscaping). This permits developers to immediately deduct the full cost of qualifying assets, permitting investors to front-load their returns (thereby improving cash flow and

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investor yields). Moreover, effective for tax years beginning with 2025, changes to Internal Revenue Code §163(j) caused by the OBBBA will significantly expand interest deductions and offer more flexibility for businesses, particularly those with substantial capital investments.

In July 2025, the Federal Housing Finance Agency (FHFA) also doubled the annual LIHTC equity investment capacity for Fannie Mae and Freddie Mac, from $1 billion to $2 billion each (and $4 billion in total). And the NMTC program, often paired with LIHTC in mixed-use projects, was made permanent at an annual funding level of $5 billion.

The above said, the OBBBA terminated the Section 45L New Energy Efficient Home Credit for property acquired after June 30, 2026, and solar tax credits face accelerated sunsets that require construction to begin before July 4, 2026, to qualify for current levels.

E. PROPERTY ASSESSED CLEAN ENERGY ("PACE")

In November 2009, New York State passed enabling legislation for Property Assessed Clean Energy ("PACE"),[129] permitting local governments to establish programs by which property owners can finance energy efficiency, renewable energy and water conservation improvements to their property by adding the cost to their real property tax bill, thereby effectively allowing them to repay the loan over time through a special assessment on their real property taxes. More specifically, the statute allows municipalities to grant loans to building owners using Federal grant assistance or municipal bonds backed by a Federal loan guarantee. The intent of the program is to promote improved energy efficiency in buildings, as well as on-site power generation from alternative or renewable sources. PACE programs thus access a new source of up-front financing: proceeds of municipal bonds for residential and commercial building owners alike, with repayment coming from local property tax assessments over an extended period. Elimination of the owner's need to raise up-front capital and the use of deductible property tax payments that may be passed through to tenants make the PACE approach of particular interest to commercial property owners.

Repayment of PACE loans come from an annual special assessment on an owner's real property tax bill for a term of years to be determined by the local or state government, typically 15 to 20 years, and interest on the loan is likely to accrue at the below-market rates available to government agencies. As such, the assessment is added to the real property tax bill, and it is secured by the real property. The funding agency receives a senior tax lien on the real property benefitted by the loan, rather than just a lien on the renewable energy system or energy-efficiency improvements. This feature, potentially of concern to pre-existing lenders as it takes priority over mortgage payments, is often accompanied by certain limitations on the amount of the lien relative to value or through some other mechanism designed to address lender concerns, particularly in the single-family residential market. Further, some programs require a minimum level of energy savings to be realized through the project relative to its cost for it to qualify, generally known as an SIR requirement. The decades-long term for repayment of PACE loans, coupled with savings from lower energy bills, allows for positive cash flow on renewable energy systems and energy retrofits. In addition, recipients of PACE loans may be eligible for certain other tax benefits, such as being able to deduct the interest portion of the repayments and claiming Federal income tax credits for the cost of renewable energy facilities.

The above said, the utility and availability of PACE programs remain seriously in doubt. During July 2010, the Federal Housing Finance Agency (which oversees Fannie Mae and Freddie Mac) issued a statement that directed Fannie and Freddie not to underwrite mortgage loans for properties with a PACE assessment. It further directed mortgage lenders to tighten lending standards in communities with PACE programs. The FHFA actions were prompted by two principal concerns:

1. PACE benefits do not meet a valid public purpose; and

2. PACE program defaults raise concerns with regard to the safety and soundness of the mortgage industry.

Given this, the Federal Housing Administration (FHA) no longer insures mortgages on properties with PACE liens, due to concerns over increased difficulty for homeowners with selling homes because of the priority lien status of PACE loans, greater challenges with securing mortgage financing, and potentially higher interest rates and increased greater property tax burdens for borrowers

[129] The New York State General Municipal Law Article 5-L, also known as the PACE Statute.

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As of the date of this handbook, the FHFA's position has remained consistent.

Changes to the PACE program during 2025 and Current Status

The PACE program experienced significant legislative updates (and proposals) with expanded eligibility during 2025, thereby supporting the state's climate goals under the Climate Leadership and Community Protection Act (CLCPA). Proposed new legislation (Senate Bill 2025-S2418) would remove the traditional "cost-effectiveness" standard, which would likely increase the variety of projects eligible for PACE funding, with long-term environmental value prioritized over immediate financial return. Further, to ensure local oversight, the legislation specifically requires municipal consent for project funding. Consistent with the prioritization of long-term environmental value, New York State has primarily through the Advanced Building Codes, Appliance and Equipment Efficiency Standards Act of 2022 mandated that The New York State Energy Research and Development Authority (NYSERDA**)** issue updated energy efficiency improvement guidelines.

Likewise, New York City now allows PACE for new construction projects and major renovations which result in all-electric buildings, with those properties subject to ground leases now eligible for both retrofit and new construction financing. Further, PACE eligibility was expended beyond merely energy efficiency to now also cover water conservation and resiliency (to support larger decarbonization goals). "Pre-qualified" status is also now granted to retrofit projects that result in full electrification, with their exemption from the Savings-to-Investment Ratio (SIR) requirement (which should allow non-electrification measures, such as window replacements, to be included in the total PACE financing package).

In addition, effective January 2025, a Consumer Financial Protection Bureau (CFPB) ruling clarified that voluntary obligations (such as PACE loans) are considered "credit" under Regulation Z. Given this, effective March 1, 2026, PACE loans will now fall under Trust in Leading Act (TILA) rules, thereby requiring increased disclosures, ability-to-repay assessments, and conformance to TRID forms for consumer protection on residential applications.

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FOREIGN TRADE ZONES

BY THOMAS D. GLASCOCK & JULIE A. MARSHALL

Foreign-Trade Zones ("FTZ"), sometimes referred to as "Free-Trade Zones" or "Free Zones," are specifically designated geographic areas located within a 60-mile radius of a U.S. port of entry or within a 90-minute drive from the outer limits of a Customs and Border Protection port of entry. The zones are administered by the Foreign-Trade Zones Board (FTZB) under the US Department of Commerce and under the supervision of the U.S. Customs and Border Protection ("CBP") and, once activated, are considered outside CBP territory. These zones allow both domestic and foreign merchandise, with generally any merchandise that can be legally brought into a U.S. territory eligible for admission into a FTZ, to receive the same Customs treatment as if it were outside the commerce of the United States ("U.S."). The primary benefits to using an FTZ are related to duties/tariffs, processing fees and certain regulatory requirements for products entering the U.S.

There are 2 types of FTZs available for designation, a general purpose FTZ and a special purpose FTZ. General purpose FTZs are typically comprised of large warehouse or industrial park facilities where finished product, equipment, component parts and raw materials or other items and goods are stored. Special purpose FTZs (or “subzones”), on the other hand, can be available for businesses with business needs not satisfied by a general purpose FTZ, such as manufacturing plants, oil refineries, and distribution factories. Because, within a subzone the business is responsible for all costs, such FTZs may only be cost-effective for larger facilities.

A. PROGRAM BENEFITS

FTZs help businesses lower the cost of international transactions. Three of the most notable duty-related benefits of a FTZ are duty deferral, duty inversion (when the duty rate of the overall completed good is lower than the duty rate of its component parts) and duty elimination.

i. Duty Deferral

In general, payment of duties and excise taxes on foreign merchandise admitted to a zone will be deferred until the goods exit from the FTZ and enter into a U.S. Customs territory, with no time limit existing for how long the goods may remain in the FTZ. Merchandise may be manufactured or changed in condition while in the zone, subject to prior approval from the FTZ Board. As such, manufacturing or processing may substantially lower the duties paid on merchandise that enters U.S. commerce. In addition, merchandise or materials may be permanently stored, destroyed or exported, eliminating, in most cases, the need to pay duties and excise taxes. Companies may also import its equipment into its FTZ and defer duties until the equipment is used in production. This allows companies to defer the duty on the imported equipment when installation and training may take a significant amount of time.

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ii. Duty Inversion

Duty inversion or inverted tariff results when the duty rate for the finished item is lower than the duty rate of its component parts. A manufacturer has the option of paying a duty based on the finished product or on its individual components, whichever is less. Further, if the item is manufactured within an FTZ, U.S. importers can take advantage of the inverted duty/tariff and keep the manufacturing within the U.S. The inverted tariff is predominantly used by the electronics, automotive, chemical, petroleum, pharmaceutical and aerospace manufacturing industries. The benefit allows manufacturers to produce a final product at a lower duty rate than for the imported components whereby the imported components are no longer considered to be in their original form and subject to the higher duty rate; the duty is paid at the lower rate of the final product.

iii. Duty Elimination

FTZ users can eliminate the U.S. duty altogether on items that are ultimately exported from the FTZ to locations outside of the U.S. The U.S. benefits from the value added to the imported product through production or manufacturing. The duty is also eliminated on product that is destroyed or scrapped and does not have a secondary market in the U.S. Scrap or waste that is exported also benefits from duty elimination in the same way that any export for a FTZ does.

iv. Logistical Benefits

Logistical benefits are another advantage of operating within an FTZ. Merchandise processing fees are reduced since zone users can file a single customs entry and pay a single fee per week rather than multiple entries (and multiple fees) during the course of the week. Those fees are capped at a 0.3464% duty to a maximum of $485 per week, which can result in significant savings for importers of high value or high-volume shipments. Moreover, re-exported goods are not subject to duties or quotas in an FTZ.

FTZ users may also import product into zone locations which may not have met certain regulatory requirements. Product may be awaiting approval, may be subject to relabeling, or may require alterations to meet certain regulatory requirements for admission into the United States. This benefit may be helpful to a business awaiting regulatory approval, but which wants to have the product ready for market. It can ship the unapproved inventory to an FTZ, and store it there until approval is received for admission of the product into the U.S.

In most instances, imports subject to quota may be retained within a FTZ once a quota has been reached, allowing zone users access to potentially discounted inputs and the ability to admit merchandise as soon as a new quota year starts. Additionally, except for certain textiles, inputs subject to quota may be manipulated or manufactured while in the zone into a product not subject to a quota.

Other benefits of a FTZ include improved cash flow and inventory management, elimination of duties for rejected or defective parts, automated recordkeeping and document storage and lessened U.S. regulatory agency requirements for re-export. FTZ warehouses also offer several advantages over bonded warehouses, including the ability to place both foreign and domestic merchandise in a FTZ warehouse and no time limitations for FTZ merchandise.

In New York State, there are approximately 16 active FTZ projects. Overall, there are more than 230 general purpose zones and almost 400 subzones currently approved across the U.S. They must be within or adjacent to a U.S. CBP port of entry. To learn more about the benefits of operating within a FTZ, see https://www.cbp.gov/border-security/ports-entry/cargo-security/cargo-control/foreign-trade-zones/about.

B. CHANGES DURING 2025 AND CURRENT STATUS

The FTZ program experienced significant changes during 2025, caused by new executive actions, new and changed tariffs, and alterations in e-commerce policy, resulting in (among other things) new tariffs and the elimination of the e-commerce de minimis exemption. While FTZs remain an important vehicle for realizing duty deferral, importers and exporters now face greater compliance scrutiny, increased reporting requirements, and a reduction in traditional inverted tariff benefits. Prior to these changes, the e-commerce de minimis exemption permitted low-value imports (originally less than $200 fair retail value, but increased to less than $800 in 2016) to enter duty-free, with importers then permitted to ship directly to consumers thereby bypassing tariffs. Further, if shipped from a FTZ as a finished good, traditional inverted tariff benefits allowed manufacturers to elect to pay the duty rate for a finished product when lower than the individual rates for its component parts.

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As changed, effective August 29, 2025, duty-free treatment for most small shipments was ended, and new security and digital documentation mandates are now imposed for operators, along with an increased frequency of CBP audits. Moreover, ongoing adjustments to Section 301/232 tariffs continue. In 2026, FTZ operators and users also now face a range of penalties for non-compliance, including general daily fines (with each day a violation continues construed as a separate offense), civil monetary penalties under 19 U.S.C. §1592, liquidated damages for an operator's bond violations, the potential seizure and forfeiture of goods, revocation of trusted trader status, mandatory duty restoration, and criminal penalties.

Notwithstanding these changes (which are significant), FTZs remain a powerful tool for importers and exporters, with FTZ's still a key vehicle for achieving duty deferral.

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ARPA AND SLFRF

BY SHAWN M. GRIFFIN

1. Overview:

The American Rescue Plan Act ("ARPA") was passed into law on March 11, 2021, as part the federal government's efforts to combat the widespread effects of the COVID-19 pandemic. Funding to address the pandemic's effects was allocated through the Coronavirus Recovery Fund, which was created by ARPA. Responsibility for administering the funds was assigned to the Department of the Treasury ("Treasury"), whose Final Rule for the Coronavirus State and Local Recovery Funds Program ("SLFRF") became effective on April 1, 2022. SLFRF has several purposes, which include providing assistance to local governments, families and businesses, supporting essential public services and expanding long-term economic growth and job opportunities.

SLFRF funds may be used for a variety of enumerated activities, such as to replace lost public sector revenue; support the COVID-19 public health and economic responses; provide premium pay for essential workers; to invest in water, sewer, and broadband infrastructure; and to promote the development of affordable housing, especially transit-oriented housing development. The Final Rule provides for broad flexibility in the use of the SLFRF funds, and the list of enumerated uses is expressly non-exhaustive. SLFRF funds may be available for other, non-enumerated uses, if the project identifies and responds to the impacts of the COVID-19 Pandemic and serves populations that have been disproportionately impacted. Projects that propose non-enumerated uses must be responsive and proportional to the harm identified in order to be eligible and may need to provide written justification.

2. Recipients:

ARPA funding, through SLFRF, has been made directly available to eligible recipients, including state, local (metropolitan city and county) and tribal governments. Smaller municipalities and special purpose units of local government (such as police and fire services) are not eligible as direct recipients, but a direct recipient may transfer money to such entities to carry out a project or program on behalf of the recipient as a subrecipient. Recipients may also distribute funds to non-governmental beneficial recipients, such as non-profit organizations, for the entity's direct benefit, to address direct negative impacts of the pandemic on the entity. Subrecipients are subject to the same restrictions on use of the SLFRF funds and same reporting requirements as primary recipients. Beneficial recipients are subject to the same use restrictions but are subject to different reporting requirements.

3. Administration and Eligibility:

Funds from the SLFRF may be distributed as grants, short-term loans and long-term loans. The Final Rule also allows the recipient to apply funds to finance the outside administration of its loan programs and may use interest earned to pay for such services. This includes hiring consultants to support effective management and oversight, and consultation services for ensuring compliance with legal, regulatory and other requirements. Additionally, SLFRF funding may be combined with other federal funding (e.g., other federal affordable and fair housing programs) without limitation, but the project must meet all criteria and comply with all requirements of all programs from which funding is received.

Per the Final Rule, provided that the funds from SLFRF are obligated and disbursed in accordance with the Final Rule, neither the funds nor any interest earned on the funds are not required to be repaid to Treasury. Any funds that the recipient utilizes in the form of loans may be redeployed as the loans are repaid, provided that the funds continue to be utilized for eligible purposes.

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In the case of funds used to promote affordable housing, short term loans may only be used for "bridge" funding, and long-term loans must be for no less than 20 years and must be at least coterminous with the affordability covenants in order to prevent the funds from being churned into ineligible uses. SLFRF requires that all funds be obligated by December 31, 2024, and expended by December 31, 2026. The funds are considered expended as soon as they are disbursed to the grant or loan recipient.

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APPENDICES

- **A** STRAIGHT LEASE AND TAX-EXEMPT BOND TRANSACTIONS
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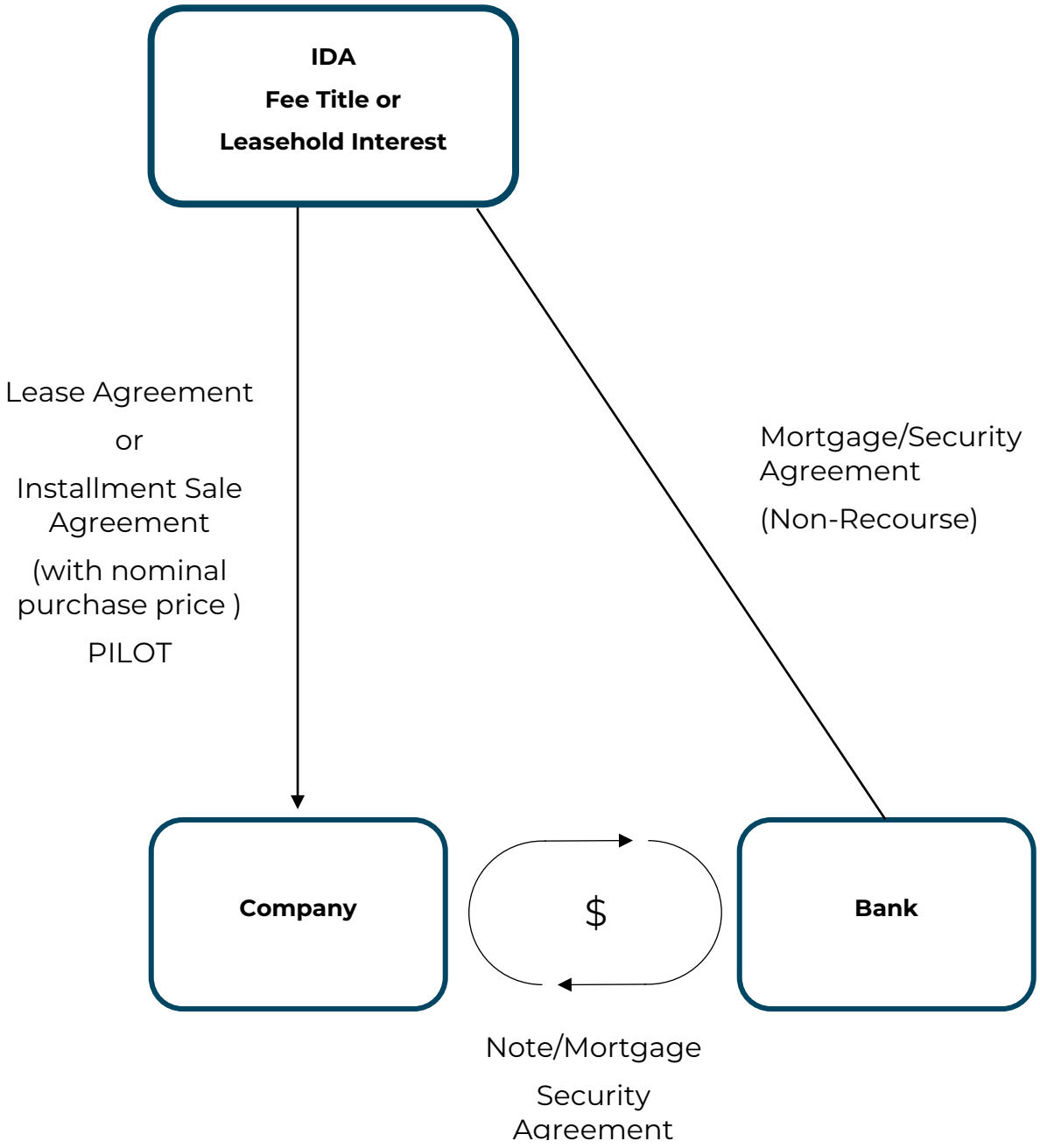
APPENDIX A

STRAIGHT LEASE AND TAX-EXEMPT BOND TRANSACTIONS

A. STRAIGHT LEASE TRANSACTION



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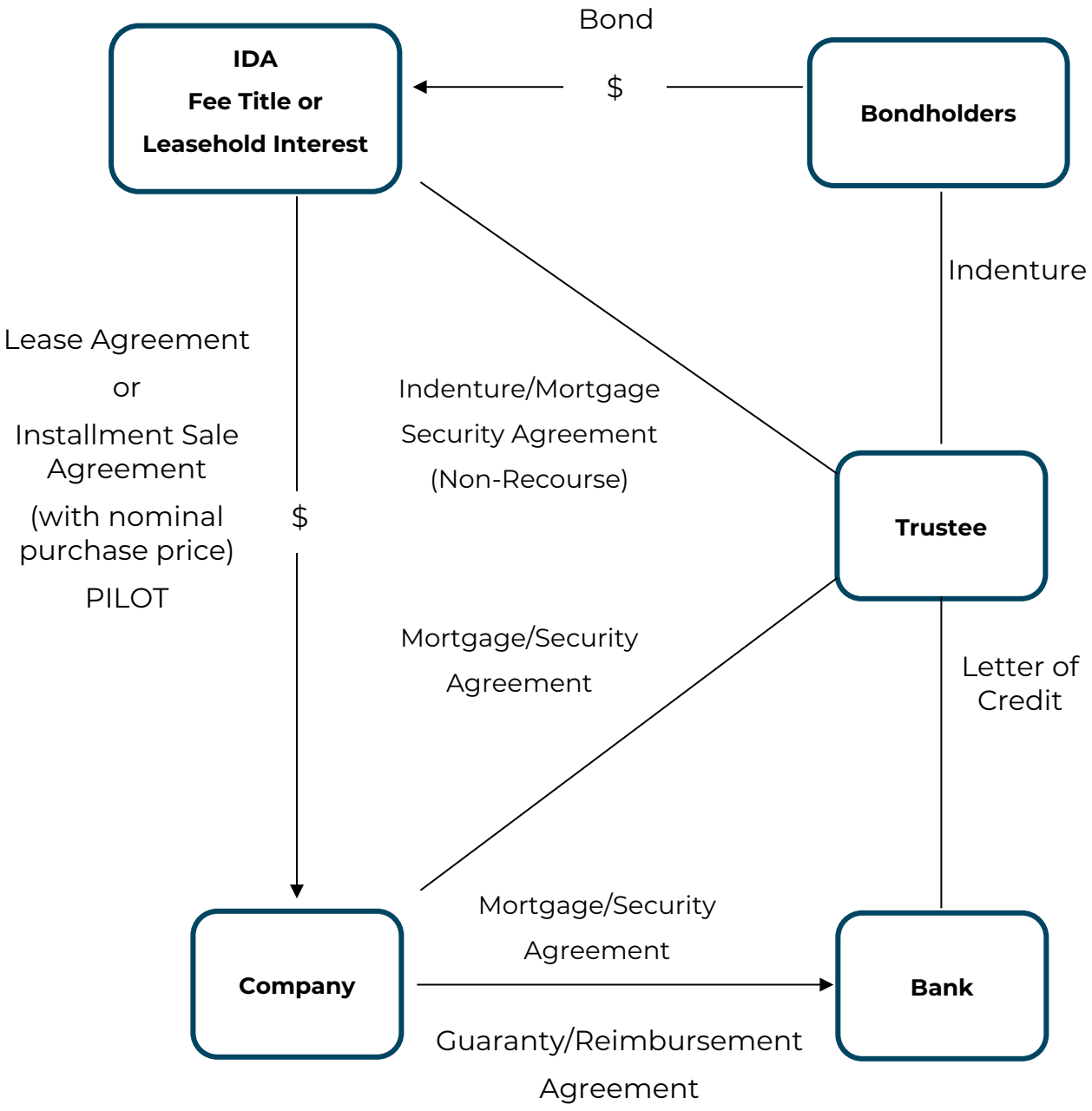
B. BOND TRANSACTIONS



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APPENDIX B

A. SECTION 1411 OF THE NEW YORK NOT-FOR-PROFIT CORPORATION LAW

1. Section 1411. Local Development Corporations

(a) Purposes. This section shall provide an additional and alternate method of incorporation or reincorporation of not-for-profit corporations for any of the purposes set forth in this paragraph and shall not be deemed to alter, impair or diminish the purposes, rights, powers or privileges of any corporation heretofore or hereafter incorporated under this section or under the stock or business corporation laws. Corporations may be incorporated or reincorporated under this section as not-for-profit local development corporations operated for the exclusively charitable or public purposes of relieving and reducing unemployment, promoting and providing for additional and maximum employment, bettering and maintaining job opportunities, instructing or training individuals to improve or develop their capabilities for such jobs, carrying on scientific research for the purpose of aiding a community or geographical area by attracting new industry to the community or area or by encouraging the development of, or retention of, an industry in the community or area, and lessening the burdens of government and acting in the public interest, and any one or more counties, cities, towns or villages of the State, or any combination thereof, or the New York job development authority in exercising its power under the public authorities law to encourage the organization of local development corporations, may cause such corporations to be incorporated by public officers or private individuals or reincorporated upon compliance with the requirements of this section, and it is hereby found, determined and declared that in carrying out said purposes and in exercising the powers conferred by paragraph (b) such corporations will be performing an essential governmental function.

(b) Type of corporation. A local development corporation is a charitable corporation under this chapter.

(c) Powers. In furtherance of its purposes set forth in paragraph (a) but not for any other purposes, a local development corporation incorporated or reincorporated under this section shall have the following powers: to construct, acquire, rehabilitate and improve for use by others industrial or manufacturing plants in the territory in which its operations are principally to be conducted, to assist financially in such construction, acquisition, rehabilitation and improvement, to maintain such plants for others in such territory, to disseminate information and furnish advice, technical assistance and liaison with Federal, State and local authorities with respect thereto, to acquire by purchase, lease, gift, bequest, devise or otherwise real or personal property or interests therein, to borrow money and to issue negotiable bonds, notes and other obligations therefore, and notwithstanding § 510 (Disposition of all or substantially all assets) without leave of the court, to sell, lease, mortgage or otherwise dispose of or encumber any such plants or any of its real or personal property or any interest therein upon such terms as it may determine and, in connection with loans from the New York job development authority, to enter into covenants and agreements and to comply with all the terms, conditions and provisions thereof, and otherwise to carry out its corporate purposes and to foster and encourage the location or expansion of industrial or manufacturing plants in the territory in which the operations of such corporation are principally to be conducted, provided, however, that no such corporation shall attempt to influence legislation by propaganda or otherwise, or participate or intervene, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.

(d) Purchase or lease of real property owned by a county, city, town or village.

(1) The local legislative body of a county, city, town or village or, if there is a board of estimate in a city, then the board of estimate may by resolution determine that specifically described real property owned by the county, city, town or village is not required for use by such county, city, town or village and authorize the county, city, town or village to sell or lease such real property to a local development corporation incorporated or reincorporated under this article; provided, however, that title to such land be not declared inalienable as a forest preserve or a parkland.

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(2) Notwithstanding the provisions of any general, special or local law, charter or ordinance to the contrary, such sale or lease may be made without appraisal, public notice, (except as provided in subparagraph (4)) or public bidding for such price or rental and upon such terms as may be agreed upon between the county, city, town or village and said local development corporation; provided, however, that in case of a lease, the term may not exceed ninety nine years and provided, further, that in cities having a population of one million or more, no such sale or lease shall be made without the approval of a majority of the members of the borough improvement board of the borough in which such real property is located.

(3) Before any sale or lease to a local development corporation incorporated or reincorporated under this article shall be authorized, a public hearing shall be held by the local legislative body, or by the board of estimate, as the case may be, to consider the proposed sale or lease.

(4) Notice of such hearing shall be published at least 10 days before the date set for the hearing in such publication and in such manner as may be designated by the local legislative body, or the board of estimate as the case may be.

(5) A local development corporation, incorporated or reincorporated under this section, which purchases or leases real property from a county, city, town or village, shall not, without the written approval of the county, city, town or village, use such real property for any purpose except the purposes set forth in the certificate of incorporation or reincorporation of said local development corporation. In the event such real property is used in violation of the restrictions of this paragraph, the attorney general may bring an action or special proceeding to enjoin the unauthorized use.

(e) Certificate of Incorporation. In addition to the requirements of § 402 (Certificate of incorporation; contents) the certificate of incorporation or reincorporation of a local development corporation incorporated or reincorporated under this article shall state: (i) that all income and earnings of such corporation shall be used exclusively for its corporate purposes or accrue and be paid to the New York job development authority; (ii) that no part of the income or earnings of such corporation shall inure to the benefit or profit of, nor shall any distribution of its property or assets be made to any member or private person, corporate or individual, or any other private interest, except that the certificate of incorporation or reincorporation may authorize the repayment of loans and may also authorize the repayment of contributions (other than dues) to the local development corporation but only if and to the extent that any such contribution may not be allowable as a deduction in computing taxable income under the Internal Revenue Code of 1954; and (iii) that if such corporation accepts a mortgage loan or loans from the New York job development authority, such corporation shall be dissolved in accordance with the provisions of paragraph (g) upon the repayment or other discharge in full by such corporation of all such loans.

(f) Exemption of income from taxation. The income and operations of corporations incorporated or reincorporated under this section shall be exempt from taxation.

(g) Dissolution. Upon the dissolution of any local development corporation incorporated or reincorporated under this section, no member or private person, corporate or individual, or other private interest shall be entitled to any distribution or division of its remaining funds and other property and rights and interests in property, and the balance thereof, after the payment of all debts and liabilities of the corporation of whatsoever kind and nature, (including the payment of loans and contributions the repayment of which has been authorized in its certificate of incorporation or reincorporation) shall be distributed to one or more counties, cities, towns or villages within the territory designated in its certificate of incorporation or reincorporation as the territory in which its operations are principally to be conducted, for furtherance of the purposes set forth in paragraph (a), or to the New York job development authority, as shall be provided by said corporation or by order of the supreme court of the State of New York pursuant to § 1008 (Jurisdiction of supreme court to supervise dissolution and liquidation).

(h) Corporations heretofore incorporated. Any corporation heretofore incorporated under the membership corporations law or this chapter, or under the stock or business corporation law for any of the purposes set forth in paragraph (a) of this section may amend its certificate of incorporation and be reincorporated as a local development corporation organized under this section by making and filing in the office of the secretary of state a certificate, stating the name of such corporation, and, if it has been changed, the name under which it was originally incorporated, the date of its incorporation, the names and post office addresses of its members or of the holders of record of all of the outstanding shares of such corporation entitled to vote with relation to the proceedings

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provided for in the certificate and that such corporation has elected to become and be a local development corporation organized and operated under and by virtue of this section. Such certificate shall be either: (i) subscribed in person or by proxy by all of the members or the holders of record of all of the outstanding shares of such corporation entitled to vote with relation to such proceedings and shall have annexed an affidavit of the secretary or an assistant secretary that the persons who have executed the certificate, in person or by proxy, constitute all of the members or the holders of record of all of the outstanding shares of the corporation entitled to vote with relation to the proceedings provided for in the certificate; or (ii) subscribed by the president or a vice president and the secretary or an assistant secretary and shall have annexed an affidavit of such officers stating that they have been authorized to execute and file such certificate by the votes, cast in person or by proxy, of all of the members or of the holders of record of all of the outstanding shares of such corporation entitled to vote with relation to such proceedings at the meeting at which such votes were cast, and that such votes were cast at a meeting of members or stockholders held on a date specified, upon notice pursuant to § 605 (Notice of meeting of members) or to § 605 of the Business Corporation Law. Every certificate filed under this paragraph shall have endorsed thereon or annexed thereto the approval of a justice of the supreme court of the judicial district in which the office of the corporation is to be located. A reincorporation pursuant to this paragraph shall not effect a dissolution of the corporation, but shall be deemed a continuation of its corporate existence, without affecting its then existing property rights or liabilities, or the liabilities of its members or officers as such, but thereafter it shall have only such rights, powers and privileges, and be subject only to such other duties and liabilities, as a corporation created for the same purposes under this article.

(i) Effect of section. Corporations incorporated or reincorporated under this section shall be organized and operated exclusively for the purposes set forth in paragraph (a), shall have, in addition to the powers otherwise conferred by law, the powers conferred by paragraph (c) and shall be subject to all the restrictions and limitations imposed by paragraph (e) and paragraph (g). In so far as the provisions of this section are inconsistent with the provisions of any other law, general or special, the provisions of this section shall be controlling as to corporations incorporated or reincorporated hereunder.

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APPENDIX C

A. STATE ENVIRONMENTAL QUALITY REVIEW ACT ("SEQRA") PROCESS

1. EXCERPTS FROM THE STATE ENVIRONMENTAL QUALITY REVIEW ACT

Section 617.2 Definitions

As used in this Part, unless the context otherwise requires:

"Type I Action" means an action or class of actions identified in § 617.4 of this Part, or in any involved agency's procedures adopted pursuant to § 617.14 of this Part.

"Type II Action" means an action or class of actions identified in § 617.5 of this Part. When the term is applied in reference to an individual agency's authority to review or approve a particular proposed project or action, it shall also mean an action or class of actions identified as Type II Actions in that agency's own procedures to implement SEQR adopted pursuant to § 617.14 of this Part.

"Unlisted Action" means all actions not identified as a Type I or Type II Action in this Part, or, in the case of a particular agency action, not identified as a Type I or Type II Action in the agency's own SEQR procedures.

Section 617.3 General Rules

No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR. A project sponsor may not commence any physical alteration related to an action until the provisions of SEQR have been complied with. The only exception to this is provided under paragraphs 617.5(c)(18), (21) and (28) of this Part. An involved agency may not issue its findings and decision on an action if it knows any other involved agency has determined that the action may have a significant adverse impact on the environment until a final EIS has been filed. The only exception to this is provided under subparagraph 617.9(a)(5)(i) of this Part.

SEQR does not change the existing jurisdiction of agencies nor the jurisdiction between or among State and local agencies. SEQR provides all involved agencies with the authority, following the filing of a final EIS and written findings statement, or pursuant to subdivision 617.7(d) of this Part to impose substantive conditions upon an action to ensure that the requirements of this Part have been satisfied. The conditions imposed must be practicable and reasonably related to impacts identified in the EIS or the conditioned negative declaration.

An application for agency funding or approval of a Type I or Unlisted Action will not be complete until:

(1) a negative declaration has been issued; or

(2) until a draft EIS has been accepted by the lead agency as satisfactory with respect to scope, content and adequacy. When the draft EIS is accepted, the SEQR process will run concurrently with other procedures relating to the review and approval of the action, if reasonable time is provided for preparation, review and public hearings with respect to the draft EIS.

The lead agency will make every reasonable effort to involve project sponsors, other agencies and the public in the SEQR process. Early consultations initiated by agencies can serve to narrow issues of significance and to identify areas of controversy relating to environmental issues, thereby focusing on the impacts and alternatives requiring in-depth analysis in an EIS.

Each agency involved in a proposed action has the responsibility to provide the lead agency with information it may have that may assist the lead agency in making its determination of significance, to identify potentially significant adverse impacts in the scoping process, to comment in a timely manner on the EIS if it has concerns which need to be addressed and to participate, as may be needed, in any public hearing. Interested agencies are strongly encouraged to make known their views on the action, particularly with respect to their areas of expertise and jurisdiction.

No SEQR determination of significance, EIS or findings statement is required for actions which are Type II.

Actions commonly consist of a set of activities or steps. The entire set of activities or steps must be considered the action, whether the agency

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decision-making relates to the action as a whole or to only a part of it.

(1) Considering only a part or segment of an action is contrary to the intent of SEQR. If a lead agency believes that circumstances warrant a segmented review, it must clearly state in its determination of significance, and any subsequent EIS, the supporting reasons and must demonstrate that such review is clearly no less protective of the environment. Related actions should be identified and discussed to the fullest extent possible.

(2) If it is determined that an EIS is necessary for an action consisting of a set of activities or steps, only one draft and one final EIS need be prepared on the action provided that the statement addresses each part of the action at a level of detail sufficient for an adequate analysis of the significant adverse environmental impacts. Except for a supplement to a generic environmental impact statement (See section 617.10(d) of this Part), a supplement to a draft or final EIS will only be required in the circumstances prescribed in paragraph 617.9(a)(7) of this Part.

Agencies must carry out the terms and requirements of this Part with minimum procedural and administrative delay, must avoid unnecessary duplication of reporting and review requirements by providing, where feasible, for combined or consolidated proceedings, and must expedite all SEQR proceedings in the interest of prompt review.

Time periods in this Part may be extended by mutual agreement between a project sponsor and the lead agency, with notice to all other involved agencies by the lead agency.

Section 617.4 Type I Actions

The purpose of the list of Type I Actions in this section is to identify, for agencies, project sponsors and the public, those actions and projects that are more likely to require the preparation of an EIS than Unlisted Actions. All agencies are subject to this Type I list.

(i) This Type I list is not exhaustive of those actions that an agency determines may have a significant adverse impact on the environment and require the preparation of an EIS. However, the fact that an action or project has been listed as a Type I Action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS. For all individual actions which are Type I or Unlisted, the determination of significance must be made by comparing the impacts which may be reasonably expected to result from the proposed action with the criteria listed in section 617.7(c) of this Part.

(ii) Agencies may adopt their own lists of additional Type I Actions, may adjust the thresholds to make them more inclusive, and may continue to use previously adopted lists of Type I Actions to complement those contained in this section. Designation of a Type I Action by one involved agency requires coordinated review by all involved agencies. An agency may not designate as Type I any action identified as Type II in § 617.5 of this Part.

The following actions are Type I if they are to be directly undertaken, funded or approved by an agency:

(1) the adoption of a municipality's land use plan, the adoption by any agency of a comprehensive resource management plan or the initial adoption of a municipality's comprehensive zoning regulations;

(2) the adoption of changes in the allowable uses within any zoning district, affecting 25 or more acres of the district;

(3) the granting of a zoning change, at the request of an applicant, for an action that meets or exceeds one or more of the thresholds given elsewhere in this list;

(4) the acquisition, sale, lease, annexation or other transfer of 100 or more contiguous acres of land by a state or local agency;

(5) construction of new residential units that meet or exceed the following thresholds:

(i) 10 units in municipalities that have not adopted zoning or subdivision regulations;

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(ii) 50 units not to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewerage treatment works;

(iii) in a city, town or village having a population of 150,000 persons or less, 200 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewerage treatment works;

(iv) in a city, town or village having a population of greater than 150,000 but less than 1,000,000 persons, 500 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works; or

(v) in a city or town having a population of 1,000,000 or more persons, 1,000 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;

(6) activities, other than the construction of residential facilities, that meet or exceed any of the following thresholds; or the expansion of existing nonresidential facilities by more than 50% of any of the following thresholds:

(i) a project or action that involves the physical alteration of 10 acres;

(ii) a project or action that would use ground or surface water in excess of 2,000,000 gallons per day;

(iii) parking for 500 vehicles in a city, town or village having a population of 150,000 persons or less;

(iv) parking for 1,000 vehicles in a city, town or village having a population of more than 150,000 persons;

(v) in a city, town or village having a population of 150,000 persons or less, a facility with more than 100,00 square feet of gross floor area;

(iv) in a city, town or village having a population of more than 150,000 persons, a facility with more than 240,000 square feet of gross floor area;

(7) any structure exceeding 100 feet above original ground level in a locality without any zoning regulation pertaining to height;

(8) any Unlisted Action that includes a nonagricultural use occurring wholly or partially within an agricultural district (certified pursuant to Agriculture and Markets Law, article 25-AA, § 303 and 304) and exceeds 25% of any threshold established in this section;

(9) any Unlisted action (unless the action is designed for the preservation of the facility or site), that exceeds 25 percent of any threshold established in this section, occurring wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district or prehistoric site that is listed on the National Register of Historic Places (Volume 36 of the Code of Federal Regulations, parts 60 and 63, which is incorporated by reference pursuant to section 617.17 of this Part), or that is listed on the State Register of Historic Places or that has been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation and Historic Preservation Law;

(10) any Unlisted Action, that exceeds 25% of any threshold in this section, occurring wholly or partially within or substantially contiguous to any publicly owned or operated parkland, recreation area or designated open space, including any site on the Register of National Natural Landmarks pursuant to 36 CFR Part 62, 1994 (See § 617.17 of this Part); or

(11) any Unlisted Action that exceeds a Type I threshold established by an involved agency pursuant to § 617.14 of this Part.

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Section 617.5 Type II Actions

Actions or classes of actions identified in this section are not subject to review under this Part. These actions have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under Environmental Conservation Law, article 8. The actions identified in this section apply to all agencies.

Each agency may adopt its own list of Type II Actions to supplement the actions listed in this section. The fact that an action is identified as a Type II action in an agency's procedures does not mean that it must be treated as a Type II action by any other involved agency not identifying it as a Type II action in its procedures. An agency that identifies an action as not requiring any determination or procedure under this Part is not an involved agency. Each of the actions on an agency Type II list must:

(1) in no case, have a significant adverse impact on the environment based on the criteria contained in section 617.7(c) of this Part; and

(2) not be a Type I Action as defined in § 617.4 of this Part.

The following actions are not subject to review under this Part:

(1) maintenance or repair involving no substantial changes in an existing structure or facility;

(2) replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading buildings to meet building or fire codes, unless such action meets or exceeds any of the thresholds in § 617.4 of this Part;

(3) retrofit of an existing structure and its appurtenant areas to incorporate green infrastructure;

(4) agricultural farm management practices, including construction, maintenance and repair of farm buildings and structures, and land use changes consistent with generally accepted principles of farming;

(5) repaving of existing highways not involving the addition of new travel lanes;

(6) street openings and right-of-way openings for the purpose of repair or maintenance of existing utility facilities;

(7) installation of telecommunication cables in existing highway or utility rights of way utilizing trenchless burial or aerial placement on existing poles;

(8) maintenance of existing landscaping or natural growth;

(9) construction or expansion of a primary or accessory/appurtenant, non-residential structure or facility involving less than 4,000 square feet of gross floor area and not involving a change in zoning or a use variance and consistent with local land use controls, but not radio communication or microwave transmission facilities;

(10) routine activities of educational institutions, including expansion of existing facilities by less than 10,000 square feet of gross floor area and school closings, but not changes in use related to such closings;

(11) construction or expansion of a single-family, a two-family or a three-family residence on an approved lot including provision of necessary utility connections as provided in paragraph (13) and the installation, maintenance or both, and conveyance of land in connection therewith; or upgrade of a drinking water well and a septic system;

(12) construction, expansion or placement of minor accessory/appurtenant residential structures, including garages, carports, patios, decks, swimming pools, tennis courts, satellite dishes, fences, barns, storage sheds or other buildings not changing land use or density;

(13) extension of utility distribution facilities, including gas, electric, telephone, cable, water and sewer connections to render service in approved subdivisions or in connection with any action on this list;

(14) installation of solar energy arrays where such installation involves 25 acres or less of physical alteration on the following sites:

(i) closed landfills;

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(ii) brownfield sites that have received a Brownfield Cleanup Program certificate of completion ("COC" pursuant to ECL § 27-1419 and 6 NYCRR § 375-3.9 or Environmental Restoration Project sites that have received a COC pursuant to 6 NYCRR § 375-4.9, where the COC under either program for a particular site has an allowable use of commercial or industrial, provided that the change of use requirements in 6 NYCRR § 375-1.11(d) are complied with;

(iii) sites that have received an inactive hazardous waste disposal site full liability release or a COC pursuant to 6 NYCRR § 375-2.9, where the Department has determined an allowable use for a particular site is commercial or industrial, provided that the change of use requirements in 6 NYCRR § 375-1.11(d) are complied with;

(iv) currently disturbed areas at publicly-owned wastewater treatment facilities;

(v) currently disturbed areas at sites zoned for industrial use; and

(vi) parking lots or parking garages;

(15) installation of solar energy arrays on an existing structure provided the structure is not:

(i) listed on the National or State Register of Historic Places;

(ii) located within a district listed in the National or State Register of Historic Places;

(iii) been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation and Historic Preservation Law; or

(iv) within a district that has been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation and Historic Preservation Law;

(16) granting of individual setback and lot line variances;

(17) granting of an area variance(s) for a single-family, two-family or three-family residence;

(18) reuse of a residential or commercial structure, or of a structure containing mixed residential and commercial uses, where the residential or commercial use is a permitted use under the applicable zoning law or ordinance, including permitted by special use permit, and the action does not meet or exceeds any of the thresholds in section 617.4 of this Part;

(19) the recommendations of a county or regional planning board or agency pursuant to General Municipal Law sections 239-m or 239-n;

(20) public or private best forest management (silvicultural) practices on less than 10 acres of land, but not including waste disposal, land clearing not directly related forest management, clear-cutting or the application of herbicides or pesticides;

(21) minor temporary uses of land having negligible or no permanent impact on the environment;

(22) installation of traffic control devices on existing streets, roads and highways;

(23) mapping of existing roads, streets, highways, natural resources, land uses and ownership patterns;

(24) information collection including basic data collection and research, water quality and pollution studies, traffic counts, engineering studies, surveys, subsurface investigations and soils studies that do not commit the agency to undertake, fund or approve any Type I or Unlisted Action;

(25) official acts of a ministerial nature involving no exercise of discretion, including building permits and historic preservation permits where issuance is predicated solely on the applicant's compliance or noncompliance with

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the relevant local building or preservation code(s);

(26) routine or continuing agency administration and management, not including new programs or major reordering of priorities that may affect the environment;

(27) conducting concurrent environmental, engineering, economic, feasibility and other studies and preliminary planning and budgetary processes necessary to the formulation of a proposal for action, provided those activities do not commit the agency to commence, engage in or approve such action;

(28) collective bargaining activities;

(29) investments by or on behalf of agencies or pension or retirement systems, or refinancing existing debt;

(30) inspections and licensing activities relating to the qualifications of individuals or businesses to engage in their business or profession;

(31) purchase or sale of furnishings, equipment or supplies, including surplus government property, other than the following: land, radioactive material, pesticides, herbicides, or other hazardous materials;

(32) license, lease and permit renewals, or transfers of ownership thereof, where there will be no material change in permit conditions or the scope of permitted activities;

(33) adoption of regulations, policies, procedures and local legislative decisions in connection with any action on this list;

(34) engaging in review of any part of an application to determine compliance with technical requirements, provided that no such determination entitles or permits the project sponsor to commence the action unless and until all requirements of this Part have been fulfilled;

(35) civil or criminal enforcement proceedings, whether administrative or judicial, including a particular course of action specifically required to be undertaken pursuant to a judgment or order, or the exercise of prosecutorial discretion;

(36) adoption of a moratorium on land development or construction;

(37) interpreting an existing code, rule or regulation;

(38) designation of local landmarks or their inclusion within historic districts;

(39) an agency's acquisition and dedication of 25 acres or less of land for parkland, or dedication of land for parkland that was previously acquired, or acquisition of a conservation easement;

(40) sale and conveyance of real property by public auction pursuant to article 11 of the Real Property Tax Law;

(41) construction and operation of an anaerobic digester, within currently disturbed areas at an operating publicly-owned landfill, provided the digester has a feedstock capacity of less than 150 wet tons per day, and only produces Class A digestate (as defined in 6 NYCRR § 361-3.7) that can be beneficially used or biogas to generate electricity or to make vehicle fuel, or both;

(42) emergency actions that are immediately necessary on a limited and temporary basis for the protection or preservation of life, health, property or natural resources, provided that such actions are directly related to the emergency and are performed to cause the least change or disturbance, practicable under the circumstances, to the environment. Any decision to fund, approve or directly undertake other activities after the emergency has expired is fully subject to the review procedures of this Part;

(43) actions undertaken, funded or approved prior to the effective dates set forth in SEQR (See Chapters 228 of the Laws of 1976, 253 of the Laws of 1977 and 460 of the Laws of 1978), except in the case of an action where it is still practicable either to modify the action in such a way as to mitigate potentially adverse environmental impacts, or to choose a feasible or less environmentally damaging alternative, the commissioner may, at

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the request of any person, or on his or her own motion, require the preparation of an environmental impact statement; or, in the case of an action where the responsible agency proposed a modification of the action and the modification may result in a significant adverse impact on the environment, an environmental impact statement must be prepared with respect to such modification;

(44) actions requiring a certificate of environmental compatibility and public need under articles VII, VIII or X of the Public Service Law and the consideration of, granting or denial of any such certificate;

(45) actions subject to the class A or class B regional project jurisdiction of the Adirondack Park Agency or a local government pursuant to §§ 807, 808 and 809 of the Executive Law, except class B regional projects subject to review by local government pursuant to § 807 of the Executive Law located within the Lake George Park as defined by subdivision one of § 43-0103 of the Environmental Conservation Law; and

(46) actions of the Legislature and the Governor of the State of New York or of any court, but not actions of local legislative bodies except those local legislative decisions such as rezoning where the local legislative body determines the action will not be entertained.

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APPENDIX D

A. EXCERPTS FROM THE OPEN MEETINGS LAW[130]

Section 102 Definitions

As used in this article:

"Meeting" means the official convening of a public body for the purpose of conducting public business including the use of videoconferencing for attendance and participation by the members of the public body.

"Public body" means 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 § 66 of the General Construction Law, or committee or subcommittee or other similar body 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. [Section 66 of the General Construction Law defines public corporation to include a municipal corporation, a district corporation, or a public benefit corporation. A municipal corporation includes a county, city, town, village and school district.]

"Executive session" means that portion of a meeting not open to the general public.

Section 103 Open Meetings and Executive Sessions

Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with § 105 of this article.

Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of § 55 of the Public Buildings Law.

A public body that uses videoconferencing to conduct its meetings shall provide an opportunity for the public to attend, listen and observe at any site at which a member participates.

Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings.

Any meeting of a public body that is open to the public shall be open to being photographed, broadcast, webcast, or otherwise recorded and/or transmitted by audio or video means. As used herein the term “broadcast” shall also include the transmission of signals by cable.

Section 104 Public Notice

Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least 72 hours before such meeting.

Public notice of the time and place of every other meeting shall be given to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

The public notice provided for by this section shall not be construed to require publication as a legal notice.

If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that the videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations.

If a meeting will be streamed live over the internet, the public notice for the meeting shall inform the public of the internet address of the website streaming such meeting.

[130] N.Y. Public Officers Law, Article 7, “Open Meetings Law".

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When a public body has the ability to do so, notice of the time and place of a meeting given in accordance with subdivision one or two of this section, shall also be conspicuously posted on the public body's internet website.

Attorney-Client Privilege

In those circumstances where a public body seeks legal advice from its attorney and the attorney renders legal advice, the attorney-client privilege may validly be asserted, and communications made within the scope of the privilege will be outside the coverage of the Open Meetings Law. Therefore, even though there may be no basis for conducting an executive session pursuant to §105 of the Open Meetings Law, a private discussion may be held based on the assertion of the attorney-client privilege, pursuant to the exception provided in §108(3) of the Open Meetings Law.

Select Revisions to the Open Meetings Law

First, effective April 14, 2010, Section 103 of the Open Meetings Law has been amended, requiring public bodies to make a reasonable effort to hold public meetings in a room which can accommodate members of the public who wish to attend. In the past, the Open Meetings Law was silent regarding facility size and there have been instances where large numbers of the public have been prohibited from observing or participating in meetings otherwise required to be "open" to them. The amendments to the Open Meetings Law do not address the potential issue of whether a public entity would be required to re-locate a public hearing or meeting after it has been called to order, for example, if an unexpectedly large crowd was to attend (or would be permitted to provide audio and/or video access in, say, an adjoining room). Given the lack of clarity on this issue, further guidance from the courts, the New York State Attorney General's Office or the New York State Committee on Open Government may be sought.

Second, effective on June 14, 2010, if a court determines that a public body failed to comply with any of the requirements of the Open Meetings Law, the court may declare that the actions or approvals undertaken by the public body void, in whole or in part, without prejudice to reconsideration in compliance with the requirements of the Open Meetings Law. If the court finds such a violation, it may also require that the members of the public body participate in a training session concerning the obligations imposed by the Open Meetings Law conducted by the staff of the Committee on Open Government.

Third, effective April 1, 2011, any meeting of a public entity may be recorded, broadcast, webcast and photographed as long as it is not disruptive to the proceedings of the meeting. However, public bodies may adopt rules and regulations (consistent with recommendations from the Committee on Open Government) governing the location of the equipment and personnel used to photograph, broadcast, webcast or record those proceedings. Any rules and regulations adopted by the public body must be conspicuously posted during meetings and written copies made available to meeting attendees upon request.

Fourth, effective February 2, 2012, any records made available to the public pursuant to the Freedom of Information Law ("FOIL"), as well as any proposed resolutions, law, rule, regulation, policy or any amendments thereto that are scheduled to be the subject of a discussion by a public body during an open meeting, must be made available upon request, to the extent practical, prior to or at the meeting during which the records will be discussed. A copy of such records may be made available for a reasonable fee, determined in accordance with the FOIL statute. If the agency in which such public body functions, maintains a regularly updated website and uses high speed internet connections, any such records must be posted on the website to the extent practical as determined by the agency in question, prior to the open meeting.

Finally, Open Meetings Law was amended by Chapter 56 of the Laws of 2022, which added a new section 103-a (the “Videoconferencing Law”). The Videoconferencing Law provides for limited use of remote meetings utilizing video conferencing technology.

The OML requires public bodies to conduct open meetings with an established quorum in one or more locations which are open to in-person attendance by the public. The Videoconferencing Law allows each public body to decide if it will permit its members, under extraordinary circumstances, to attend the meeting remotely from locations not open to the public. Where this is permitted by a public body, remote participants participating in public meetings as board members may vote on proposed actions of the public body, but may not count towards the established quorum for the meeting. It is important to note that the Videoconferencing Law permits remote participation by board members only in extraordinary circumstances, which are limited to when a member cannot be physically present due to a significant or unexpected factor such as disability, illness, and childcare responsibilities (not for mere convenience or due to vacation or other travel plans).

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Public board can elect to comply with traditional OML requirements, which includes conducting all public meetings in one or more public locations with established quorum(s) that are fully accessible and open to the public. In the alternative, the Videoconferencing Law allows public boards to establish a policy permitting limited remote participation by board members via videoconference from non-noticed, non-publicly accessible locations, but only under extraordinary circumstances.

In order to implement the allowed use of videoconferencing under OML Section 103-a, the public board must:

- develop a compliant videoconferencing policy, which includes written procedures for the conduct of meetings with remote participants (the "Policy");
- schedule a public hearing to review the proposed Policy;
- conduct the public hearing to review the proposed Policy;
- following the public hearing, adopt a resolution approving the Policy.

The adopted Policy should generally (i) establish written procedures governing member and public attendance and to be posted on the public body's website; (ii) except for executive sessions, ensure that members can be heard, seen and identified while each meeting is conducted with any videoconferencing; (v) require that minutes of any meeting utilizing videoconferencing identify all members participating remotely; (vi) require that public meeting notices indicate that videoconferencing is being used and inform the public where the public can view and/or participate in the meeting, (vii) require meeting agendas and documents to be posted or available, and identify the physical location where the public can attend; (viii) state that each meeting conducted using videoconferencing must be recorded and posted on the public board's website within 5 business days of the meeting, made available for 5 years, and transcribed upon request; and (ix) state that where public participation and comment is allowed for a meeting utilizing videoconferencing, authorized, the public must also have an opportunity to view the video and to participate in the proceedings via videoconference in real time.

B. GENERAL INFORMATION ON THE OPEN MEETINGS LAW[131]

The Open Meetings or "Sunshine Law" went into effect in New York in 1977. Amendments that clarify and reaffirm your right to hear the deliberations of public bodies became effective on October 1, 1979. In brief, the law gives the public the right to attend meetings of public bodies, listen to the debates and watch the decision-making process in action. As stated in the legislative declaration in the Open Meetings Law (Section 100): "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 the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."

What is a Meeting?

Although the definition of "meeting" was vague as it appeared in the original law, the amendments to the law clarify the definition and the definition has been expansively interpreted by the courts. "Meeting" is defined to mean "the official convening of a public body for the purpose of conducting public business." As such, any time a quorum of a public body gathers for the purpose of discussing public business, the meeting must be convened open to the public, whether or not there is an intent to take action, and regardless of the manner in which the gathering may be characterized. The definition also authorizes members of public bodies to conduct meetings by videoconference. Nonetheless, a meeting cannot validly be held by telephone or through the use of e-mail.

Since the law applies to "official" meetings, chance meetings or social gatherings are not covered by the law. Also, the law is silent with respect to public participation. Therefore, a public body may permit you to speak at open meetings, but is not required to do so.

What is Covered by the Law?

The law applies to all public bodies. "Public Body" is defined to cover entities consisting of two or more people that require a quorum to conduct public business and perform a governmental function for the State, for an agency of the State, or for public corporations, including cities, counties, towns, villages and school districts, for example. In addition, committees and subcommittees

[131] This information is taken from the New York State handbook entitled "Your Right to Know: New York State's Open Government Laws".

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consisting solely of members of a governing body are specifically included within the definition. Consequently, city councils, town boards, village boards of trustees, school boards, commissions, legislative bodies and sub/committees of those groups all fall within the framework of the law.

Notice of Meetings

The law requires that notice of the time and place of all meetings be given prior to every meeting. If a meeting is scheduled at least a week in advance, notice must be given to the public and the news media not less than 72 hours prior to the meeting. Notice to the public must be accomplished by posting in one or more designated public locations. When a meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. Again, notice to the public must be given by means of posting.

If videoconferencing is used to conduct a meeting, the public notice for the meeting must inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations.

When Can a Meeting be closed?

The law provides for closed or "executive" sessions under circumstances prescribed in the law. It is important to emphasize that an executive session is not separate from an open meeting, but rather is defined as a portion of an open meeting during which the public may be excluded.

To close a meeting for executive session, the law requires that a public body take several procedural steps. First, a motion must be made during an open meeting to enter into executive session; second, the motion must identify "the general area or areas of the subject or subjects to be considered"; and third, the motion must be carried by a majority vote of the total membership of a public body.

Further, a public body cannot close its doors to the public to discuss the subject of its choice, for the law specifies and limits the subject matter that may appropriately be discussed in executive session. The eight subjects that may be discussed behind closed doors include:

(1) matters which will imperil the public safety if disclosed;

(2) any matter which may disclose the identity of a law enforcement agency or informer;

(3) information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;

(4) discussions regarding proposed, pending or current litigation;

(5) collective negotiations pursuant to Article 14 of the Civil Service Law (the Taylor Law);

(6) the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;

(7) the preparation, grading or administration of examinations; and

(8) the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

These are the only subjects that may be discussed behind closed doors; all other deliberations must be conducted during open meetings. It is important to point out that a public body can never vote to appropriate public monies during a closed session. Therefore, although most public bodies may vote during a properly convened executive session, any vote to appropriate public monies must be taken in public. The law also states that an executive session can be attended by members of the public body and any other persons authorized by the public body.

After the Meeting – Minutes

If you cannot attend a meeting, you can still find out what actions were taken, because the Open Meetings Law requires that minutes of both

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open meetings and executive sessions must be compiled and made available. Minutes of an open meeting must consist of "a record or summary of all motions, proposals, resolutions and any matter formally voted upon and the vote thereon." Minutes of executive sessions must consist of "a record or summary of the final determination" of action that was taken, "and the date and vote thereon." Therefore, if, for example, a public body merely discusses a matter during executive session, but takes no action, minutes of an executive session need not be compiled. However, if action is taken, minutes of the action taken must be compiled and made available.

It is also important to point out that the Freedom of Information Law requires that a voting record must be compiled that identifies how individual members voted in every instance in which a vote is taken. Consequently, minutes that refer to a four to three vote must also indicate who voted in favor, and who voted against.

Enforcement of the Law

What can be done if a public body holds a secret meeting? What if a public body makes a decision during an executive session that should have been open? Any "aggrieved" person can bring a lawsuit. Since the law says that meetings are open to the general public, you would be aggrieved if you feel that you have been improperly excluded from a meeting or if you believe that an executive session was held that should have been open.

Upon a judicial challenge, a court may nullify action taken by a public body in violation of the law. In addition, a court also has the authority to award reasonable attorney fees to the successful party. This means that if you go to court and you win, a court may (but need not) reimburse you for your expenditure of legal fees.

It is noted that an unintentional failure to fully comply with the notice requirements "shall not alone be grounds for invalidating action taken at a meeting of a public body."

The Site of Meetings

As specified earlier, all meetings of a public body are open to the general public. Moreover, the law requires that public bodies make reasonable efforts to ensure that meetings are held in facilities that permit "barrier free physical access" to physically handicapped persons.

Exemptions from the Law

The Open Meetings Law does not apply to:

1. judicial or quasi-judicial proceedings, except proceedings of zoning boards of appeals;
2. deliberations of political committees, conferences and caucuses; or
3. matters made confidential by Federal or State law.

Stated differently, the law does not apply to proceedings before a court or before a public body that acts in the capacity of a court, to political caucuses, or to discussions concerning matters that might be made confidential under other provisions of law. For example, Federal law requires that records identifying students be kept confidential. As such, a discussion of records by a school board regarding a particular student would constitute a matter made confidential by Federal law that would be exempt from the Open Meetings Law.

Public Participation and Recording Meetings

The Open Meetings Law provides the public with the right to attend meetings of public bodies, but it is silent concerning the ability of members of the public to speak or otherwise participate. Although public bodies are not required to permit the public to speak at their meetings, many have chosen to do so. In those instances, it has been advised that a public body should do so by adopting reasonable rules that treat members of the public equally.

There is nothing in the Open Meetings Law dealing with the right of those in attendance to record meetings. However, judicial decisions indicate that any person present may record an open meeting (using either an audio or video recorder), so long as use of a recording device is not disruptive or obtrusive.

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APPENDIX E

A. INFORMATION CONCERNING THE FREEDOM OF INFORMATION LAW[132]

The Freedom of Information Law, effective January 1, 1978, reaffirms your right to know how your government operates. It provides rights of access to records reflective of governmental decisions and policies that affect the lives of every New Yorker. The law preserves the Committee on Open Government, which was created by enactment of the original Freedom of Information Law in 1974.

Scope of the Law

The law defines "agency" to include all units of State and local government in New York State, including State agencies, public corporations and authorities, as well as any other governmental entities performing a governmental function for the State or for one or more units of local government in the State. *See* NY CLS Pub O § 86(3).

The term "agency" does not include the State Legislature or the courts. As such, for purposes of clarity, "agency" will be used hereinafter to include all entities of government in New York, except the State Legislature and the courts, both of which will be discussed later.

What is a Record?

The law defines "record" as "any information kept, held, filed, produced or reproduced by, with or for an agency of the State Legislature, in any physical form whatsoever..." *See* NY CLS Pub O § 86(4). Thus it is clear that items such as tape recordings, microfilm and computer discs fall within the definition of "record." An agency is not required to create a new record or provide information in response to questions to comply with the law. However, the courts have held that an agency must provide records in the form requested if it has the ability to do so. For instance, if the agency can transfer data into a requested format, the agency must do so upon payment of the proper fee.

Accessible Records

The original statute granted rights of access to nine specified categories of records to the exclusion of all others. Therefore, unless a record conformed to one of the categories of accessible records, it was presumed deniable.

The current law, reversing that presumption, states that all records are accessible, except records or portions of records that fall within one of the enumerated categories of deniable records. *See* NY CLS Pub O § 87(2).

Deniable records include records or portions thereof that:

(1) are specifically exempted from disclosure by State or Federal statute;

(2) would if disclosed result in an unwarranted invasion of personal privacy;

(3) would if disclosed impair present or imminent contract awards or collective bargaining negotiations;

(4) 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;

(5) 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 relative to a criminal investigation; or

132 This information is taken from the New York State handbook entitled "Your Right to Know: New York State Open Government Laws".

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iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

(6) could if disclosed endanger the life or safety of any person;

(7) are inter-agency or intra-agency communications, except to the extent that such materials consist of:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the Federal government; or

(8) are examination questions or answers that are requested prior to the final administration of such questions; or

(9) if disclosed, would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures.

The categories of deniable records are generally directed to the effects of disclosure. They are based in great measure upon the notion that disclosure would in some instances "impair," "cause substantial injury," "interfere," "deprive," "endanger," etc. This represents a significant change from the thrust of the original enactment.

One category of deniable records that does not deal directly with the effects of disclosure is exception (g), which deals with inter-agency and intra-agency materials. The intent of the exception is twofold. Memoranda or letters transmitted from an official of one agency to an official of another or between officials within an agency may be denied, so long as the communications (or portions thereof) are advisory in nature, such as advice, opinions or recommendations. For example, an opinion prepared by staff which may be rejected or accepted by the head of an agency need not be made available. However, the statistical or factual information, as well as the policies and determinations upon which an agency relies in carrying out its duties should be made available.

There are also special provisions in the law regarding the protection of trade secrets and critical infrastructure information. Those provisions pertain only to State agencies and enable a person submitting records to State agencies to request that records be kept separate and apart from all other agency records on the ground that they constitute trade secrets. In addition, when a request is made for records falling within these special provisions, the submitter of such records is given notice and an opportunity to justify a claim that the records would if disclosed result in substantial injury to his or her competitive position or other harm. A member of the public requesting records may challenge such a claim.

Generally, the law provides access to existing records. Therefore, an agency need not create a record in response to a request. Nevertheless, each agency must maintain the following records (*See* NY CLS Pub O § 87(3)):

(a) a record of the final vote of each member in every agency proceeding in which the member votes;

(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency; and

(c) a reasonably detailed current list by subject matter of all records in possession of an agency, whether or not the records are accessible.

Production of Records

With respect to the production of records, Section 87(5)(a) now requires an agency to furnish records in the medium requested and precludes the agency from any encrypting records provided in computer format. Further, amendments to Section 89(3)(a) of FOIL state that an agency shall not deny a request due to insufficient staff or other basis, if an outside service can be retained to accommodate the requestor, and if the requestor agrees to pay the actual cost of reproducing the records.

Section 89(3) of FOIL had historically provided that FOIL pertains to existing records and does not require that an agency create a record in response to a request. Section 89(3) now provides that "any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested...or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record." Therefore, if a request reasonably describes records or data maintained electronically, and when extracting the data with new programming is more efficient than manual

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retrieval or redactions from non-electronic records, the agency is required to do so. Section 87(5)(b) also prohibits an agency from entering into or renewing a contract to create or maintain records if such a contract will impair public inspection or copying.

Protection of Privacy

One of the exceptions to rights of access, referred to earlier, states that records may be withheld when disclosure would result in "an unwarranted invasion of personal privacy." *See* NY CLS Pub O § 87(2)(b).

Unless otherwise deniable, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy when identifying details are deleted, when the person to whom a record pertains consents in writing to disclosure, or when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him or herself.

How To Obtain Records

Subject Matter List. As noted earlier, each agency must maintain a "subject matter list." The list is not a compilation of every record an agency has in its possession, but rather is a list of the subjects or file categories under which records are kept. It must make reference to all records in possession of an agency, whether or not the records are available. You have a right to know the kinds of records agencies maintain.

The subject matter list must be compiled in sufficient detail to permit you to identify the file category of the records sought.

Regulations

Each agency must adopt standards based upon general regulations issued by the Committee. These procedures describe how you can inspect and copy records. The Committee's regulations and a model designed to enable agencies to easily comply are available on request and on the Committee's website.

Designation of Records Access Officer

Under the regulations, each agency must appoint one or more persons as records access officer. The records access officer has the duty of coordinating an agency's response to public requests for records.

The records access officer is responsible for responding to requests directly or ensuring that agency personnel keep the subject matter list up to date, assist you in identifying records sought, make the records promptly available or deny access in writing, provide copies of records or permit you to make copies, certifying that a copy is a true copy and, if the records cannot be found, certify either that the agency does not have possession of the requested records or that the agency does have the records, but they cannot be found after diligent search.

The regulations also state that the public shall continue to have access to records through officials who have been authorized previously to make information available.

Requests for records

An agency may ask you to make your request in writing. The law requires you to "reasonably describe" the record in which you are interested. *See* NY CLS Pub O § 89(3). Whether a request reasonably describes records often relates to the nature of an agency's filing or recordkeeping system. If records are kept alphabetically, a request for records involving an event occurring on a certain date might not reasonably describe the records. Locating the records in that situation might involve a search for the needle in the haystack, and an agency is not required to engage in that degree of effort. The responsibility of identifying and locating records sought rests to an extent upon the agency. If possible, you should supply dates, titles, file designations, or any other information that will help agency staff to locate requested records, and it may be worthwhile to find out how an agency keeps the records of your interest (i.e., alphabetically, chronologically or by location) so that a proper request can be made.

The law also provides that agencies must accept requests and transmit records requested via email when they have the ability to do so. For additional guidance concerning email requests, see the following link: http://www.dos.ny.gov/coog/emailresponse.html.

Within five business days of the receipt of a written request for a record reasonably described, the agency must make the record available, deny access in writing giving the reasons for denial, or furnish a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied, which must be reasonable in consideration of attendant circumstances, such as the volume or complexity of the request. The approximate date ordinarily cannot exceed 20 business days from the date of the acknowledgment of the receipt of a request. If the agency acknowledges the receipt of a request and concludes a request cannot be

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granted within 20 business days, it is required to inform the person requesting the record of the reason for the delay, and to provide a specific date when it will grant access. When a specific date beyond 20 business days is given, it must be reasonable in relation to the circumstances of the request.

If the agency fails to abide by any of the requirements concerning the time within which it must respond to a request, the request is deemed denied, and the person seeking the records may appeal the denial.

Fees

Copies of records must be made available on request. Except when a different fee is prescribed by statute, an agency may not charge for inspection, certification or search for records, or charge in excess of 25 cents per photocopy up to 9 by 14 inches. *See* NY CLS Pub O § 87(1)(b)(iii). Fees for copies of other records may be charged based upon the actual cost of reproduction. If an agency has no photocopying equipment, a transcript of records can be made on request. However, you may be charged for the clerical time involved.

Section 87(1)(c) defines the basis for determining the actual cost of reproducing records maintained electronically.

However, where substantial time is needed to prepare a copy (defined in the statute as at least two hours of an employee's time) the FOIL permits an agency to now charge a fee based on the cost of the storage medium used, as well as the hourly salary of the lowest paid employee who has the skill needed to do so. Specifically, Section 87(1)(b)(iii) of FOIL now requires the agency to prescribe the "actual cost" of reproducing the records. Section 87(c) excludes from "actual cost" any search time or administrative time and precludes charging a fee for preparing the copy unless it takes at least two hours. Section 87(c) also requires the agency to inform the requestor of the estimated cost of preparing a copy of a record if more than two hours of employee time are needed or if the agency engages outside assistance in preparing the record.

Additionally, Section 89(3) precludes an agency from claiming the records are voluminous or that it lacks adequate staff if the agency may engage outside professional services to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover as "actual cost."

Denial of Access and Appeal

Unless a denial of a request occurs due to a failure to respond in a timely manner, a denial of access must be in writing, stating the reason for the denial and advising you of your right to appeal to the head or governing body of the agency or the person designated to determine appeals by the head or governing body of the agency. You may appeal within 30 days of a denial.

Upon receipt of the appeal, the agency head, governing body or appeals officer has 10 business days to fully explain in writing the reasons for further denial of access or to provide access to the records. Copies of all appeals and the determinations thereon must be sent by the agency to the Committee on Open Government. *See* NY CLS Pub O § 89(4)(a). This requirement will enable the Committee to monitor compliance with law and intercede when a denial of access may be improper. A failure to determine an appeal within 10 business days of its receipt is considered a denial of the appeal.

You may seek judicial review of a final agency denial by means of a proceeding initiated under Article 78 of the Civil Practice Law and Rules. When a denial is based upon one of the exceptions to rights of access that were discussed earlier, the agency has the burden of proving that the record sought falls within one or more of the exceptions. *See* NY CLS Pub O § 89(4)(b).

The Freedom of Information Law permits a court, in its discretion, to award reasonable attorney's fees to a person denied access to records. To do so, a court must find that the person denied access "substantially prevailed," and either that the agency had no reasonable basis for denying access or that it failed to comply with the time limits for responding to a request or an appeal.

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APPENDIX F

A. IDA COMPLIANCE CHECKLIST – 19 NYCRR 250

Application posted to website (See Attached Application Checklist)

Uniform criteria for evaluation and selection posted to website (See Attached Recommended Uniform Project Evaluation Policy)

Project Agreement posted to website (See Attached Recommended Project Agreement)

Policy for Suspension or Discontinuance of Financial Assistance posted to website (See Attached Recommended Policy)

Recapture Policy posted to website (See Attached Recommended Policy)

Annual report of active projects posted to website and provided to board members (PARIS Report)

B. APPLICATION CHECKLIST

Name and address of project applicant

Project description, including:

- Type
- Location
- Purpose

Amount and type of financial assistance (including itemized value of each)

"But for" statement

Capital cost of project, including

- Real property
- Equipment
- Construction
- Renovation
- Private sector sources
- Public sector sources
- Equity

Employment information, including

- Number of FTEs
- Projected monthly timeframe for creation of new jobs per year
- Salary and benefits
- Estimate of number of jobs filled by residents of economic development region or labor market defined by Agency (if Agency defines labor market, no more than 6 contiguous counties)
- Statement regarding removal/abandonment
- Statement regarding substantial compliance with local, state and federal tax, worker protection and environmental laws, rules and regulations
- Statement regarding false/misleading information

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C. UNIFORM PROJECT EVALUATION POLICY

Pursuant to and in accordance with Section 859-a(5) of the General Municipal Law ("GML"), the [_____] (the "Agency") hereby establishes a Uniform Project Evaluation Policy for the evaluation and selection for all qualifying categories of projects for which the Agency may provide Financial Assistance (as defined in Section 854(14) of the GML) in accordance with its Uniform Tax Exemption Policy ("UTEP").

For each Application for Financial Assistance received by the Agency, the following must occur prior to authorizing the project and provision of Financial Assistance:

1) The Agency shall undertake an assessment of all material information included in connection with the Application for Financial Assistance as necessary to afford a reasonable basis for the decision by the Agency to provide Financial Assistance for the Project, including, but not limited to qualification of the proposed project under the GML (including any retail analysis, as applicable), conducting a full application review, review of applicant financial history and project pro-formas, and consideration of all local development priorities;

2) A written cost-benefit analysis shall be utilized by the Agency that identifies the extent to which a project will create or retain permanent, private sector jobs, the estimated value of any tax exemptions to be provided; the amount of private sector investment generated or likely to be generated by the proposed project; the likelihood of accomplishing the proposed project in a timely fashion; and the extent to which the proposed project will provide additional sources of revenue for municipalities and school districts; and any other public benefits that might occur as a result of the project, including the economic condition of the area at the time of the application, the effect of the proposed project upon the environment and surrounding property, and the extent to which the proposed project will provide a benefit (economic or otherwise) not otherwise available within the municipality in which the project is located;

3) The Agency's Application for Financial Assistance shall include a statement by the applicant that the project, as of the date of the application, is in substantial compliance with all provisions of GML Article 18-A, including, but not limited to, the provisions of GML Section 859-a(5) and 862(1); and

4) If the proposed project involves the removal or abandonment of a facility or plant within the State of New York, the Agency shall notify the chief executive officer or officers of the municipality or municipalities in which the facility or plant was located.

D. RECAPTURE POLICY

The [_____] (the "IDA") reserves the right to annually review project performance and determine if a project meets the obligations required and stated in the IDA approval and project agreements. The terms and conditions of the project documents (the "Material Factors") will serve as the benchmark for determining project compliance.

Material Factors should be explicit and measurable and may include items such as investment, job creation, retention or other factors as determined by the board. Material Factors may vary by project type or specific application.

Non-Compliance Process:

If a company is found to be non-compliant with the Material Factors outlined during the course of the benefit period, the IDA shall undertake the following:

1. The IDA shall notify the company in writing that, in the IDA's determination; it has violated a Material Factor.

2. The company shall be given an opportunity to remedy the violation.

3. If it is unable to remedy the violation, the IDA shall seek additional information/explanation from the company as to why a Material

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Factor was not achieved. These may include economic or natural factors that led to the default. These factors should be discussed and predetermined to the extent possible by the Board and may include items such as, natural disaster, industry dynamics, unfair competition or economic events that were outside the control of the company.

4. The company shall be provided the opportunity to present to the IDA any information as outlined above regarding why the Material Factor was not achieved.

Board Actions:

Decisions to keep benefits in place, reduce, terminate, or recapture financial assistance will be made by the IDA Board. The following options are recommended when considering Material Factor compliance.

1. Upon a review of the facts regarding a non-compliant determination, the IDA Board may determine that the cause of the non-compliance was a valid reason for not meeting the Material Factor and may consider the matter closed without further action, or set a specific time period for the company to achieve compliance. This may also be accompanied by a period of increased reporting or such other conditions as the IDA Board may reasonably impose. (i.e., Review violated Material Factor(s) quarterly until remedied.)

2. If a company is unable to meet the Material Factors within the time allowed, the IDA Board will determine if the violation will result in the reduction, suspension, termination or recapture of financial assistance.

Reduction of Financial Assistance: At the sole discretion of the IDA Board, it may consider a reduction in assistance as an appropriate action to take in the event of non-compliance with a Material Factor.

Termination of Financial Assistance: In addition to the typical reasons why an IDA may act to terminate financial assistance such as, closure, change of use, change of ownership etc., the IDA Board may elect to terminate any ongoing financial assistance to a company. Reasons for termination should be explicit and may include continued violation of the Material Factors, failure to comply with ongoing reporting or compliance requirements of the IDA.

Recapture of Financial Assistance: An IDA Board may take action to recapture a portion or all of the financial assistance provided to a company. Actions to recapture shall be made by decision of the IDA Board. An event leading to recapture may include: an applicant knowingly providing false information on an application or a compliance/monitoring report; the IDA Board finding that the company did not make a good faith effort or have any intention of meeting a Material Factor; the company ceases operations and/or relocates prior to fulfilling the length of term for a Material Factor; or the company demonstrates a wanton disregard for state and/or local laws or regulations.

In the event an IDA is successful in recapturing financial assistance, such funds shall be returned to the appropriate affected taxing jurisdictions on a pro rata basis unless otherwise agreed upon by the local taxing jurisdiction.

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E. GENERAL MUNICIPAL LAW ARTICLE 18-A – INDUSTRIAL DEVELOPMENT

TITLE 1 - AGENCIES, ORGANIZATION AND POWERS

850. Short title.

852. Policy and purposes of article.

854. Definitions.

856. Organization of industrial development agencies.

858. Purposes and powers of the agency.

858-a. Compensation, procurement and investment.

858-b. Equal employment opportunities.

859. Financial records.

859-a. Additional prerequisites to the provisions of financial assistance.

859-b. Special procedure for the provision of financial assistance to continuing care retirement communities.

860. Moneys of the agency.

861. Notification of budget.

862. Restrictions on funds of the agency.

862-a. Additional restrictions on funds of the agency in connection with continuing care retirement communities.

864. Bonds of the agency.

866. Notes of the agency.

868. Agreements of the municipality and state.

870. State and municipality not liable on bonds or notes.

872. Bonds and notes as legal investment.

874. Tax exemptions.

875. Special provisions applicable to state sales and compensating use taxes and certain types of facilities.

876. Tax contract by the state.

878. Remedies of bondholders and noteholders.

880. Actions against the agency.

882. Termination of the agency.

883. Conflicts of interest.

884. Public bidding.

886. Title not affected if in part unconstitutional or ineffective.

888. Inconsistent provisions in other acts superseded.

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§ 850. Short title. This chapter may be cited as the "New York State Industrial Development Agency Act".

§ 852. Policy and purposes of article. It is hereby declared to be the policy of this state to promote the economic welfare, recreation opportunities and prosperity of its inhabitants and to actively promote, attract, encourage and develop recreation, economically sound commerce and industry and economically sound projects identified and called for to implement a state heritage area management plan as provided in title G of the parks, recreation and historic preservation law through governmental action for the purpose of preventing unemployment and economic deterioration by the creation of industrial development agencies which are hereby declared to be governmental agencies and instrumentalities and to grant to such industrial development agencies the rights and powers provided in this article.

§ 854. Definitions. As used in this act, unless the context otherwise requires:

(1) "Agency"--shall mean an Industrial Development Agency created pursuant to this act.

(2) "Bonds"--shall mean the bonds, notes, interim certificates and other obligations issued by the agency pursuant to this act.

(3) "Municipality"--shall mean any county, city, village, town or Indian reservation in the state.

(4) "Project"-- shall mean any land, any building or other improvement, and all real and personal properties located within the state of New York and within or outside or partially within and partially outside the municipality for whose benefit the agency was created, including, but not limited to, machinery, equipment and other facilities deemed necessary or desirable in connection therewith, or incidental thereto, whether or not now in existence or under construction, which shall be suitable for manufacturing, warehousing, research, commercial or industrial purposes or other economically sound purposes identified and called for to implement a state designated urban cultural park management plan as provided in title G of the parks, recreation and historic preservation law and which may include or mean an industrial pollution control facility, a recreation facility, educational or cultural facility, a horse racing facility, a railroad facility or an automobile racing facility, provided, however, no agency shall use its funds or provide financial assistance in respect of any project wholly or partially outside the municipality for whose benefit the agency was created without the prior consent thereto by the governing body or bodies of all the other municipalities in which a part or parts of the project is, or is to be, located, and such portion of the project located outside such municipality for whose benefit the agency was created shall be contiguous with the portion of the project inside such municipality.

(5) "Governing body"--shall mean the board or body in which the general legislative powers of the municipality are vested.

(6) "Mortgage"--shall mean a mortgage or other security device.

(7) "Revenues"--shall mean all rents, revenues, fees, charges and other sources of income derived by the agency from the leasing, sale or other disposition of a project or projects.

(8) "Industrial pollution control facility"-- shall mean any equipment, improvement, structure or facility or any land and any building, structure, facility or other improvement thereon, or any combination thereof, and all real and personal property deemed necessary therewith, which if within any city are not of a character or nature then or formerly furnished or supplied by the city, having to do with or the end purpose of which is the control, abatement or prevention of land, sewer, water, air, noise or general environmental pollution deriving from the operation of industrial, manufacturing, warehousing, commercial, recreation and research facilities, including, but not limited to any air pollution control facility, noise abatement facility, water management facility, waste water collecting system, waste water treatment works, sewage treatment works system, sewage treatment system or solid waste disposal facility or site.

(9) "Recreation facility"-- shall mean any facility for the use of the general public as spectators or participants in recreation activities, including but not limited to skiing, golfing, swimming, tennis, ice skating or ice hockey facilities, together with all buildings, structures, machinery, equipment, facilities and appurtenances thereto which

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the agency may deem necessary, useful or desirable in connection with the construction, improvement or operation of any such facility, including overnight accommodations and other facilities incidental thereto and facilities that may permit the use of recreation facilities by the general public as participants in recreation activities, but shall not include facilities for automobile or horse racing or other similar activities.

(10) "Horse racing facility"-- shall mean any facility for the use of the general public for purpose of conducting pari-mutuel wagering, licensed by the state gaming commission, as of January first, nineteen hundred seventy-seven, except non-profit racing associations, including buildings, structures, machinery, equipments, facilities and appurtenances thereto, the construction, reconstruction, acquisition and/or improvement of which shall have been approved by the state gaming commission, and that the agency may deem necessary, useful or desirable in connection with the construction, improvement or operation of such racing facility.

(11) "Railroad facility"-- shall mean, but shall not be limited to, railroad rights-of-way, beds, bridges, viaducts, tracks, switches and rolling stock and any other attendant structure, equipment, facility or property necessary or appropriate to railroading conducted in conjunction with industrial, commercial, manufacturing, recreational or warehousing operations; provided, however, that

(i) no agency shall itself operate a railroad facility for freight or passenger service, but may lease or otherwise make such facility available to an operator, subject to an agreement for the maintenance and operation of such facility for freight or passenger service, provided that passenger service does not constitute the primary purpose of the railroad facility;

(ii) prior to undertaking any project involving acquisition, construction, reconstruction, improvement, maintenance, equipping or furnishing of a railroad facility, an agency shall submit its plans for the proposed project to the commissioner of transportation; the commissioner shall, within sixty days of his receipt of the proposal, submit an analysis of the financial and operational feasibility of the proposed project, along with any recommendations for modification for improving the project's viability, to the agency, the governor, the commissioner of commerce, the temporary president of the senate, the speaker of the assembly and the governing body of the municipality in which the agency is located; and

(iii) no agency shall enter into any contract for the acquisition, construction, reconstruction, improvement, maintenance, equipping or furnishing of a railroad facility until fifteen days after the submission of the analysis and recommendations of the commissioner of transportation, or seventy-five days after submission of the agency's plan to the commissioner, whichever is earlier.

(12) "Educational or cultural facility"-- shall mean any facility identified and called for to implement a state designated heritage area management plan as provided in title G of the parks, recreation and historic preservation law that is open to the public at large as participants in educational and cultural activities including but not limited to theaters, museums, exhibitions and festival and interpretive facilities, together with buildings, structures, machinery, equipment, facilities and appurtenances thereto which the agency may deem necessary, useful or desirable in connection with the construction, improvement or operation of any such facility, including overnight accommodations and other facilities incidental thereto and facilities that may permit the use of educational or cultural facilities by the general public.

(14) "Financial assistance" - shall mean the proceeds of bonds issued by an agency, straight-leases, or exemptions from taxation claimed by a project occupant as a result of an agency taking title, possession or control (by lease, license or otherwise) to the property or equipment of such project occupant or of such project occupant acting as an agent of an agency.

(15) "Straight-lease transaction" - shall mean a transaction in which an agency takes title, possession or control (by lease, license or otherwise) to the property or equipment of a project occupant, entitling such property

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or equipment to be exempt from taxation according to the provisions of section eight hundred seventy-four of this article, and no financial assistance in the form of the proceeds of bonds issued by the agency is provided to the project occupant.

(16) "Affected tax jurisdiction" - shall mean any municipality or school district, in which a project is located, which will fail to receive real property tax payments, or other tax payments which would otherwise be due, except for the tax exempt status of an agency involved in a project.

(17) "Payments in lieu of taxes" - hall mean any payment made to an agency, or affected tax jurisdiction equal to the amount, or a portion of, real property taxes, or other taxes, which would have been levied by or on behalf of an affected tax jurisdiction if the project was not tax exempt by reason of agency involvement.

(18) "Highly distressed area" - shall mean

(a) a census tract or tracts or block numbering areas or areas or such census tract or block numbering area contiguous thereto which, according to the most recent census data available, has:

(i) a poverty rate of at least twenty percent for the year to which the data relates or at least twenty percent of households receiving public assistance; and

(ii) an unemployment rate of at least 1.25 times the statewide unemployment rate for the year to which the data relates; or

(b) a city, town, village or county within a city with a population of one million or more for which: (i) the ratio of the full value property wealth, as determined by the comptroller for the year nineteen hundred ninety, per resident to the statewide average full value property wealth per resident; and (ii) the ratio of the income per resident; as shown in the nineteen hundred ninety census to the statewide average income per resident; are each fifty-five percent or less of the statewide average; or

(c) an area which was designated an empire zone pursuant to article eighteen-B of this chapter.

(19) "Continuing care retirement community" - shall mean any facility that has been granted a certificate of authority pursuant to article forty-six or forty-six-A of the public health law and is established to provide, pursuant to continuing care retirement contracts approved pursuant to article forty-six of the public health law, or fee-for-service continuing care contracts approved pursuant to article forty-six-A of the public health law, a comprehensive, cohesive living arrangement for the elderly, and certified by the commissioner of health, that (i) has been approved for the issuance of industrial development agency bonds by the continuing care retirement community council pursuant to section forty-six hundred four-a of the public health law except that paragraphs b and g of subdivision two of section forty-six hundred four-a of the public health law shall not apply to a continuing care retirement community granted a certificate of authority pursuant to article forty-six-A of the public health law and (ii) is a not-for-profit corporation as defined in section one hundred two of the not-for-profit corporation law that is (a) eligible for tax-exempt financing under section forty-six hundred four-a of the public health law and this chapter and (b) is exempt from taxation pursuant to section 501(c)(3) of the federal internal revenue code; except that "continuing care retirement community" shall not include a facility granted a certificate of authority upon application of a state or local government applicant.

(20) "Automobile racing facility" shall mean any closed-course motorsports complex and its ancillary grounds that has at least fifty thousand fixed seats for race patrons and hosts at least one NASCAR Sprint Cup series race and at least two other nationally recognized racing events each calendar year.

§856. Organization of industrial development agencies.

(a) Upon the establishment of an industrial development agency by special act of the legislature, the governing body of the municipality for whose benefit such agency is established

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shall file within six months after the effective date of the special act of the legislature establishing such agency or before the first day of July, nineteen hundred sixty-nine, whichever date shall be later, in the office of the secretary of state, a certificate setting forth:

(1) the date of passage of the special act establishing the agency;

(2) the name of the agency;

(3) the names of the members and their terms of office, specifying which member is the chairman; and

(4) facts establishing the need for the establishment of an agency in such municipality.

(b) Every such agency shall be perpetual in duration, except that if

(1) such certificate is not filed with the secretary of state within six months after the effective date of the special act of the legislature establishing such agency or before the first day of July, nineteen hundred sixty-nine, whichever date shall be later, or if

(2) at the expiration of ten years subsequent to the effective date of the special act, there shall be outstanding no bonds or other obligations theretofore issued by such agency or by the municipality for or in behalf of the agency, then the corporate existence of such agency shall thereupon terminate and it shall thereupon be deemed to be and shall be dissolved.

(c) On or before March first of each year, the secretary of state shall prepare a list of agencies which failed to file a certificate in accordance with provisions of paragraph (a) of this subdivision within the preceding calendar year and transmit a copy of such list to the state comptroller and the commissioner of the department of economic development. On or before March first of each year, the commissioner of the department of economic development shall prepare a list of agencies which have dissolved pursuant to paragraph (b) of this subdivision or have ceased to exist pursuant to section eight hundred eighty-two of this chapter and shall transmit a copy of such list to the state comptroller.

2. An agency shall be a corporate governmental agency, constituting a public benefit corporation. Except as otherwise provided by special act of the legislature, an agency shall consist of not less than three nor more than seven members who shall be appointed by the governing body of each municipality and who shall serve at the pleasure of the appointing authority. Such members may include representatives of local government, school boards, organized labor and business. A member shall continue to hold office until his successor is appointed and has qualified. The governing body of each municipality shall designate the first chairman and file with the secretary of state a certificate of appointment or reappointment of any member. Such members shall receive no compensation for their services but shall be entitled to the necessary expenses, including traveling expenses, incurred in the discharge of their duties.

3. A majority of the members of an agency shall constitute a quorum.

4. Any one or more of the members of an agency may be an official or an employee of the municipality. In the event that an official or an employee of the municipality shall be appointed as a member of the agency, acceptance or retention of such appointment shall not be deemed a forfeiture of his municipal office or employment, or incompatible therewith or affect his tenure or compensation in any way. The term of office of a member of an agency who is an official or an employee of the municipality when appointed as a member thereof by special act of the legislature creating the industrial development agency shall terminate at the expiration of the term of his municipal office.

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§ 858. Purposes and powers of the agency. The purposes of the agency shall be to promote, develop, encourage and assist in the acquiring, constructing, reconstructing, improving, maintaining, equipping and furnishing industrial, manufacturing, warehousing, commercial, research and recreation facilities including industrial pollution control facilities, educational or cultural facilities, railroad facilities, horse racing facilities, automobile racing facilities and continuing care retirement communities, provided, however, that, of agencies governed by this article, only agencies created for the benefit of a county and the agency created for the benefit of the city of New York shall be authorized to provide financial assistance in any respect to a continuing care retirement community, and thereby advance the job opportunities, health, general prosperity and economic welfare of the people of the state of New York and to improve their recreation opportunities, prosperity and standard of living; and to carry out the aforesaid purposes, each agency shall have the following powers:

(1) To sue and be sued;

(2) To have a seal and alter the same at pleasure;

(3) To acquire, hold and dispose of personal property for its corporate purposes

(4) To acquire by purchase, grant, lease, gift, pursuant to the provisions of the eminent domain procedure law, or otherwise and to use, real property or rights or easements therein necessary for its corporate purposes in compliance with the local zoning and planning regulations and shall take into consideration regional and local comprehensive land use plans and state designated heritage area management plans, and to sell, convey, mortgage, lease, pledge, exchange or otherwise dispose of any such property in such manner as the agency shall determine. In the case of railroad facilities, however, the phrase to use real property or rights or easements therein shall not be interpreted to include operation by the agency of rail service upon or in conjunction with such facilities.

(5) To make by-laws for the management and regulation of its affairs and, subject to agreements with its bondholders, for the regulation of the use of a project or projects.

(6) With the consent of the municipality, to use agents, employees and facilities of the municipality, paying the municipality its agreed proportion of the compensation or costs;

(7) To appoint officers, agents and employees, to prescribe their qualifications and to fix their compensation and to pay the same out of funds of the agency;

(8) (a) To appoint an attorney, who may be the counsel of the municipality, and to fix the attorney's compensation for services which shall be payable to the attorney, and to retain and employ private consultants for professional and technical assistance and advice;

(b) An attorney acting as bond counsel for a project must file with the agency a written statement in which the attorney identifies each party to the transaction which such attorney represents. If bond counsel provides any legal services to parties other than the agency the written statement must describe the nature of legal services provided by such bond counsel to all parties to the transaction, including the nature of the services provided to the agency.

(9) To make contracts and leases, and to execute all instruments necessary or convenient to or with any person, firm, partnership or corporation, either public or private; provided, however, that any extension of an existing contract, lease or other agreement entered into by an agency with respect to a project shall be guided by the provisions of this article;

(10) To acquire, construct, reconstruct, lease, improve, maintain, equip or furnish one or more projects;

(11) To accept gifts, grants, loans, or contributions from, and enter into contracts or other transactions with, the United States and the state or any agency of either of them, any municipality, any public or private corporation or any other legal entity, and to use any such gifts, grants, loans or contributions for any of its corporate purposes;

(12) To borrow money and to issue bonds and to provide for the rights of the holders thereof;

(13) To grant options to renew any lease with respect to any project or projects and to

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grant options to buy any project at such price as the agency may deem desirable;

(14) To designate the depositories of its money either within or without the state;

(15) To enter into agreements requiring payments in lieu of taxes. Such agreements shall be in writing and in addition to other terms shall contain: the amount due annually to each affected tax jurisdiction (or a formula by which the amount due can be calculated), the name and address of the person, office or agency to which payment shall be delivered, the date on which payment shall be made, and the date on which payment shall be considered delinquent if not paid. Unless otherwise agreed by the affected tax jurisdictions, any such agreement shall provide that payments in lieu of taxes shall be allocated among affected tax jurisdictions in proportion to the amount of real property tax and other taxes which would have been received by each affected tax jurisdiction had the project not been tax exempt due to the status of the agency involved in the project. A copy of any such agreement shall be delivered to each affected tax jurisdiction within fifteen days of signing the agreement. In the absence of any such written agreement, payments in lieu of taxes made by an agency shall be allocated in the same proportions as they had been prior to January first, nineteen hundred ninety-three for so long as the agency's activities render a project non-taxable by affected tax jurisdictions;

(16) To establish and re-establish its fiscal year; and

(17) To do all things necessary or convenient to carry out its purposes and exercise the powers expressly given in this title.

§858-a. Compensation, procurement and investment.

1. The compensation of an officer or full-time employee of the agency (but not including part-time employees or consultants, including accountants, attorneys and bond counsel to the agency) shall not be contingent on the granting of financial assistance by an agency.

2. The provisions of section one hundred four-b of this chapter shall be applicable to the procurement of goods and services paid for by an agency for its own use and account.

3. The provisions of sections ten and eleven of this chapter shall be applicable to deposits and investments of funds for an agency's own use and account.

§858-b. Equal employment opportunities.

1. Each agency shall ensure that all employees and applicants for employment are afforded equal employment opportunity without discrimination.

2. Except as is otherwise provided by collective bargaining contracts or agreements, new employment opportunities created as a result of projects of the agency shall be listed with the New York state department of labor community services division, and with the administrative entity of the service delivery area created by the federal job training partnership act (P.L. No. 97-300) in which the project is located. Except as is otherwise provided by collective bargaining contracts or agreements, sponsors of projects shall agree, where practicable, to first consider persons eligible to participate in the federal job training partnership (P.L. No. 97-300) programs who shall be referred by administrative entities of service delivery areas created pursuant to such act or by the community services division of the department of labor for such new employment opportunities.

§859. Financial records.

1. (a) Each agency shall maintain books and records in such form as may be prescribed by the state comptroller.

(b) Within ninety days following the close of its fiscal year, each agency or authority shall prepare a financial statement for that fiscal year in such form as may be prescribed by the state comptroller. Such statement shall be audited within such ninety day period by an independent certified public accountant in accordance with government accounting standards established by the United States general accounting office. The audited financial statement shall include supplemental schedules listing all straight-

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lease transactions and bonds and notes issued, outstanding or retired during the applicable accounting period whether or not such bonds, notes or transactions are considered obligations of the agency. For each issue of bonds or notes such schedules shall provide the name of each project financed with proceeds of each issue, and whether the project occupant is a not-for-profit corporation, the name and address of each owner of each project, the estimated amount of tax exemptions authorized for each project, the purpose for which each bond or note was issued, date of issue, interest rate at issuance and if variable the range of interest rates applicable, maturity date, federal tax status of each issue, and an estimate of the number of jobs created and retained by each project. For each straight-lease transaction, such schedules shall provide the name of each project, and whether the project occupant is a not-for-profit corporation, the name and address of each owner of each project, the estimated amount of tax exemptions authorized for each project, the purpose for which each transaction was made, the method of financial assistance utilized by the project, other than the tax exemptions claimed by the project and an estimate of the number of jobs created and retained by each project.

(c) Within thirty days after completion, a copy of the audited financial statement shall be transmitted to the commissioner of the department of economic development, the state comptroller and the governing body of the municipality for whose benefit the agency was created.

(d) An agency with no bonds or notes issued or outstanding and no projects during the applicable accounting period may apply to the state comptroller for a waiver of the required audited financial statement. Application shall be made on such form as the comptroller may prescribe.

(e) If an agency or authority shall fail to file or substantially complete, as determined by the state comptroller, the financial statement required by this section, the state comptroller shall provide notice to the agency or authority. The notice shall state the following:

(i) that the failure to file a financial statement as required is a violation of this section, or in the case of an insufficient financial statement, the manner in which the financial statement submitted is deficient;

(ii) that the agency or authority has thirty days to comply with this section or provide an adequate written explanation to the comptroller of the agency's or authority's reasons for the inability to comply; and

(iii) that the agency's or authority's failure to provide either the required financial statement or an adequate explanation will result in the notification of the chief executive officer of the municipality for whose benefit the agency or authority was created of the agency's noncompliance with this section. Where such agency or authority has failed to file the required statement, the comptroller shall additionally notify the agency or authority that continued failure to file the required statement may result in loss of the agency's or authority's authority to provide exemptions from state taxes.

(iv) If an agency or authority after thirty days has failed to file the required statement or the explanation in the manner required by subparagraph (i) of this paragraph, or provides an insufficient explanation, the comptroller shall notify the chief executive officer of the municipality for whose benefit the agency or authority was created and the agency of the agency's or authority's noncompliance with this section. Such notice from the state comptroller shall further delineate in what respect the agency or authority has failed to comply with this section. If the agency or authority has failed to file the required statement, the notice shall additionally state that continued failure to file the required statement may result in loss of the

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agency's or authority's authority to provide exemptions from state taxes.

(v) If, thirty days after notification of the chief executive officer of the municipality for whose benefit the agency or authority was created of the agency's or authority's non-compliance, the agency or authority fails to file the required statement, the comptroller shall notify the chief executive officer of the municipality for whose benefit that agency or authority was created and the agency or authority that if such report is not provided within sixty days, that the agency or authority will no longer be authorized to provide exemptions from state taxes.

(vi) If, sixty days after the notification required by subparagraph (v) of this paragraph, the comptroller has not received the required statement, the agency or authority shall not offer financial assistance which provides exemptions from state taxes until such financial statement is filed and the comptroller shall so notify the agency or authority and the chief executive officer of the municipality for whose benefit the agency was created. Provided, however, that nothing contained in this paragraph shall be deemed to modify the terms of any existing agreements.

(f) Within thirty days after completion, a copy of an audited financial statement which contains transactions of or bonds or notes of civic facilities as defined in paragraph (b) of subdivision thirteen of section eight hundred fifty-four of this article, shall be transmitted by the agency to the commissioner of health, the chair of the senate finance committee, the chair of the assembly ways and means committee, the chair of the senate health committee and the chair of the assembly health committee.

2. On or before September first of each year, the commissioner of the department of economic development shall prepare and submit to the governor, speaker of the assembly, majority leader of the senate, and the state comptroller, a report setting forth a summary of the significant trends in operations and financing by agencies and authorities; departures from acceptable practices by agencies and authorities; a compilation by type of the bonds and notes outstanding; a compilation of all outstanding straight-lease transactions; an estimate of the total number of jobs created and retained by agency or authority projects; and any other information which in the opinion of the commissioner bears upon the discharge of the statutory functions of agencies and authorities.

3. On or before April first, nineteen hundred ninety-six, the commissioner shall submit to the director of the division of the budget, the temporary president of the senate, the speaker of the assembly, the chairman of the senate finance committee, the chairman of the assembly ways and means committee, the chairman of the senate local government committee, the chairman of the senate committee on commerce, economic development and small business, the chairman of the assembly committee on commerce, industry and economic development, the chairman of the assembly local governments committee and the chairman of the assembly real property taxation committee an evaluation of the activities of industrial development agencies and authorities in the state prepared by an entity independent of the department. Such evaluation shall identify the effect of agencies and authorities on: (a) job creation and retention in the state, including the types of jobs created and retained; (b) the value of tax exemptions provided by such agencies and authorities; (c) the value of payments received in lieu of taxes received by municipalities and school districts as a result of projects sponsored by such entities; (d) a summary of the types of projects that received financial assistance; (e) a summary of the types of financial assistance provided by the agencies and authorities; (f) a summary of criteria for evaluation of projects used by agencies and

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authorities; (g) a summary of tax exemption policies of agencies and authorities; and (h) such other factors as may be relevant to an assessment of the performance of such agencies and authorities in creating and retaining job opportunities for residents of the state. Such evaluation shall also assess the process by which agencies and authorities grant exemptions from state taxes and make recommendations for the most efficient and effective procedures for the use of such exemptions. Such evaluation shall further include any recommendations for changes in laws governing the operations of industrial development agencies and authorities which would enhance the creation and retention of jobs in the state.

§ 859-a Additional prerequisites to the provisions of financial assistance. Prior to providing any financial assistance of more than one hundred thousand dollars to any project, the agency must comply with the following prerequisites:

1. The agency must adopt a resolution describing the project and the financial assistance that the agency is contemplating with respect to such project. Such assistance shall be consistent with the uniform tax exemption policy adopted by the agency pursuant to subdivision four of section eight hundred seventy-four of this chapter, unless the agency has followed the procedures for deviation from such policy specified in paragraph (b) of such subdivision.

2. The agency must hold a public hearing with respect to the project and the proposed financial assistance being contemplated by the agency. Said public hearing shall be held in a city, town or village where the project proposes to locate. At said public hearing, interested parties shall be provided reasonable opportunity, both orally and in writing, to present their views with respect to the project.

3. The agency must give at least ten days published notice of said public hearing and shall, at the same time, provide notice of such hearing to the chief executive officer of each affected tax jurisdiction within which the project is located. The notice of hearing must state the time and place of the hearing, contain a general, functional description of the project, describe the prospective location of the project, identify the initial owner, operator or manager of the project and generally describe the financial assistance contemplated by the agency with respect to the project.

4. Each agency shall develop a standard application form, which shall be used by the agency to accept requests for financial assistance from all individuals, firms, companies, developers or other entities or organizations. The standard application form shall be submitted by or on behalf of the applicant, and subscribed and affirmed under the penalties of perjury by the applicant, or on behalf of the applicant by the chief executive officer or such other individual that is duly authorized to bind the applicant, as true, accurate and complete to the best of his or her knowledge. The standard application form shall include the following, and may include such other supplemental information as determined to be necessary and appropriate by the agency, including supporting documents and information provided by or on behalf of the applicant:

   (a) the name and address of the project applicant;

   (b) a description of the proposed project for which financial assistance is requested, including the type of project, proposed location and purpose of the project;

   (c) the amount and type of financial assistance being requested, including the estimated value of each type of tax exemption sought to be claimed by reason of agency involvement in the project;

   (d) a statement that there is a likelihood that the project would not be undertaken but for the financial assistance provided by the agency or, if the project could be undertaken without financial assistance provided by the agency, a statement indicating why the

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project should be undertaken by the agency;

(e) an estimate of capital costs of the project, including all costs of real property and equipment acquisition and building construction or reconstruction, financed from private sector sources, an estimate of the percentage of project costs financed from public sector sources, and an estimate of both the amount to be invested by the applicant and the amount to be borrowed to finance the project.

(f) the projected number of full time equivalent jobs that would be retained and that would be created if the request for financial assistance is granted, the projected timeframe for the creation of new jobs, the estimated salary and fringe benefit averages or ranges for categories of the jobs that would be retained or created if the request for financial assistance is granted, and an estimate of the number of residents of the economic development region as established pursuant to section two hundred thirty of the economic development law or the labor market area as defined by the agency, in which the project is located that would fill such jobs. The labor market area defined by the agency for this purpose may include no more than six contiguous counties in the state, including the county in which the project is to be located;

(g) a statement to the effect that the provisions of subdivision one of section eight hundred sixty-two of this chapter will not be violated if financial assistance is provided for the proposed project;

(h) a statement that the owner, occupant or operator receiving financial assistance is in substantial compliance with applicable local, state and federal tax, worker protection and environmental laws, rules and regulations; and

(i) a statement acknowledging that the submission of any knowingly false or knowingly misleading information may lead to the immediate termination of any financial assistance and the reimbursement of an amount equal to all or part of any tax exemptions claimed by reason of agency involvement in the project.

5. Each agency shall develop, and adopt by resolution, uniform criteria for the evaluation and selection for each category of projects for which financial assistance will be provided. At a minimum, the criteria shall require that, for each project, the following must occur prior to the approval of the provision of financial assistance:

(a) an assessment by the agency of all material information included in connection with the application for financial assistance, as necessary to afford a reasonable basis for the decision by the agency to provide financial assistance for the project;

(b) a written cost-benefit analysis by the agency that identifies the extent to which a project will create or retain permanent, private sector jobs; the estimated value of any tax exemptions to be provided; the amount of private sector investment generated or likely to be generated by the proposed project; the likelihood of accomplishing the proposed project in a timely fashion; and the extent to which the proposed project will provide additional sources of revenue for municipalities and school districts; and any other public benefits that might occur as a result of the project;

(c) a statement by the applicant that the project, as of the date of the application, is in substantial compliance with all provisions of this article including, but not limited to, the provisions of this section and subdivision one of section eight hundred sixty-two of this chapter; and

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(d) if the project involves the removal or abandonment of a facility or plant within the state, notification by the agency to the chief executive officer or officers of the municipality or municipalities in which the facility or plant was located.

6. Each agency shall develop a uniform agency project agreement that sets forth terms and conditions under which financial assistance shall be provided. The uniform agency project agreement shall be used by the agency and no financial assistance shall be provided in the absence of the execution of such an agreement. The uniform agency project agreement shall, at a minimum:

(a) describe the project and the financial assistance, including the amount and type, to be provided, and the agency purpose to be achieved;

(b) require each project owner, occupant or operator receiving financial benefits to provide annually a certified statement and documentation:

(i) enumerating the full time equivalent jobs retained and the full time equivalent jobs created as a result of the financial assistance, by category, including full time equivalent independent contractors or employees of independent contractors that work at the project location, and

(ii) indicating that the salary and fringe benefit averages or ranges for categories of jobs retained and jobs created that was provided in the application is still accurate and if it is not still accurate, providing a revised list of salary and fringe benefit averages or ranges for categories of jobs retained and jobs created.

(c) indicate the dates when PILOT payments are to be made and provide an estimate of the amounts for each affected tax jurisdiction of any payments in lieu of taxes that are included as part of the transaction, or formula or formulas by which those amounts may be calculated. In lieu of providing such information, a copy of an executed payment in lieu of tax agreement that contains the same information may be attached to the uniform agency project agreement;

(e) provide for the suspension or discontinuance of financial assistance, or for the modification of any payment in lieu of tax agreement to require increased payments, in accordance with policies developed by the agency pursuant to section eight hundred seventy-four of this title;

(f) provide for the return of all or a part of the financial assistance provided for the project, including all or part of the amount of any tax exemptions, which shall be redistributed to the appropriate affected tax jurisdiction, as provided for in policies developed by the agency pursuant to section eight hundred seventy-four of this title, unless agreed to otherwise by any local taxing jurisdiction or jurisdictions; and

(g) provide that the owner, occupant or operator receiving financial assistance shall certify, under penalty of perjury, that it is in substantial compliance with all local, state and federal tax, worker protection and environmental laws, rules and regulations.

§ 859-b Special procedure for the provision of financial assistance to continuing care retirement communities.

1. Any applicant for financing of a continuing care retirement community shall present a completed application for a certificate of authority and documentation establishing the continuing care retirement community council's approval of that application, pursuant to article forty-six of the public health law.

2. If requested by the agency, the applicant shall present an analysis dealing with any of the issues identified in paragraph (a) of subdivision four of section eight hundred seventy-four of this article.

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3. Applicants shall present the financial feasibility study, including a financial forecast and market study, and the analysis of economic costs and benefits required by article forty-six of the public health law.

4. Any information presented by the applicant pursuant to subdivisions one, two and three of this section shall be made available at the time required for published notice of the public hearing required by section eight hundred fifty-nine-a of this article. The agency shall make such information available during regular office hours in at least two locations, at least one of which shall be in the city, town or village within which the proposed project is located. Such notice shall include a statement indicating the location and times of availability of the information required by this section.

5. The industrial development agency may require the applicant to provide any additional information which it requires in order to meet the purposes of this article.

§860. Moneys of the agency. The agency shall have power to contract with the holders of any of its bonds or notes as to the custody, collection, securing, investment and payment of any moneys of the agency or any moneys held in trust or otherwise for the payment of bonds or notes or in any way to secure bonds or notes and to carry out any such contract. Moneys held in trust or otherwise for the payment of bonds or notes or in any way to secure bonds or notes and deposits of such moneys may be secured in the same manner as moneys of the agency, and all banks and trust companies are authorized to give such security for such deposits.

§861. Notification of budget. Each agency shall mail or deliver to the chief executive officer and the governing body of the municipality for whose benefit the agency was established and make available for public inspection and comment its proposed budget for the forthcoming fiscal year, no later than twenty business days before adoption. At such time, the agency shall file its proposed budget with the clerk of the municipality for whose benefit the agency was established. Such proposed budget shall contain detailed estimates in writing of the amount of revenues to be received and expenditures to be made during the forth coming fiscal year. Following its consideration of the comments received, the agency may revise its budget accordingly and shall file the revised budget with the clerk of the municipality.

§862. Restrictions on funds of the agency.

(1) No funds of the agency shall be used in respect of any project if the completion thereof would result in the removal of an industrial or manufacturing plant of the project occupant from one area of the state to another area of the state or in the abandonment of one or more plants or facilities of the project occupant located within the state, provided, however, that neither restriction shall apply if the agency shall determine on the basis of the application before it that the project is reasonably necessary to discourage the project occupant from removing such other plant or facility to a location outside the state or is reasonably necessary to preserve the competitive position of the project occupant in its respective industry.

(2) (a) Except as provided in paragraph (b) of this subdivision, no financial assistance of the agency shall be provided in respect of any project where facilities or property that are primarily used in making retail sales to customers who personally visit such facilities constitute more than one-third of the total project cost. For the purposes of this article, "retail sales" shall mean: (i) sales by a registered vendor under article twenty-eight of the tax law primarily engaged in the retail sale of tangible personal property, as defined in subparagraph (i) of paragraph four of subdivision (b) of section eleven hundred one of the tax law; or (ii) sales of a service to such customers. Except, however, that tourism destination projects shall not be prohibited by this subdivision. For the purpose of this paragraph, "tourism destination" shall mean a location or facility which is likely to attract a significant number of visitors from outside the economic development region as established by section two hundred thirty of the economic development law, in which the project is located.

(b) Notwithstanding the provisions of paragraph (a) of this subdivision,

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financial assistance may, however, be provided to a project where facilities or property that are primarily used in making retail sales of goods or services to customers who personally visit such facilities to obtain such goods or services constitute more than one-third of the total project cost, where: (i) the predominant purpose of the project would be to make available goods or services which would not, but for the project, be reasonably accessible to the residents of the city, town, or village within which the proposed project would be located because of a lack of reasonably accessible retail trade facilities offering such goods or services; or (ii) the project is located in a highly distressed area.

(c) With respect to projects authorized pursuant to paragraph (b) of this subdivision, no project shall be approved unless the agency shall find after the public hearing required by section eight hundred fifty-nine-a of this title that undertaking the project will serve the public purposes of this article by preserving permanent, private sector jobs or increasing the overall number of permanent, private sector jobs in the state. Where the agency makes such a finding, prior to providing financial assistance to the project by the agency, the chief executive officer of the municipality for whose benefit the agency was created shall confirm the proposed action of the agency.

§862-a Additional restrictions on funds of the agency in connection with continuing care retirement communities. No resolution authorizing the issuance of bonds, notes or other obligations of the agency, or for providing financial assistance in any respect, for any continuing care retirement community project shall be adopted unless and until the project has received a certificate of authorization pursuant to section forty-six hundred four-a of the public health law, and unless the project will serve the public purposes of this article by preserving permanent, private sector jobs or increasing the overall number of permanent, private sector jobs in the state.

§864. Bonds of the agency.

(1) The agency shall have the power and is hereby authorized from time to time to issue negotiable bonds for any of its corporate purposes without limitation as to amount. The agency shall have power from time-to-time and whenever it deems refunding expedient, to refund any bonds by the issuance of new bonds, whether the bonds to be refunded have or have not matured, and may issue bonds partly to refund bonds then outstanding and partly for any other purpose hereinabove described. The refunding bonds may be exchanged for the bonds to be refunded, with such cash adjustments as may be agreed, or may be sold and the proceeds applied to the purchase or redemption of the bonds to be refunded. Except as may otherwise be expressly provided by the agency, the bonds of every issue shall be special obligations of the agency payable solely from revenues derived from the leasing, sale or other disposition of a project, subject only to any agreements with the holders of particular bonds pledging any particular moneys or revenues. Whether or not the bonds are of such form and character as to be negotiable instruments under article eight of the uniform commercial code, the bonds shall be, and are hereby made, negotiable instruments within the meaning of and for all the purposes of the uniform commercial code, subject only to the provisions of the bonds for registration.

(2) The bonds shall be authorized by resolution of the agency and shall bear such date or dates, mature at such time or times, bear interest at such rate or rates, payable at such time or times, be in such denominations, be in such form, either coupon or registered, carry such registration privileges, be executed in such manner, be payable in lawful money of the United States of America at such place or places, either within or without the state, and be subject to such terms of redemption as such resolution or resolutions may provide. The bonds may be sold at public or private sale at such price or prices as the agency shall determine.

(3) Any resolution or resolutions authorizing any bonds or any issue of bonds may contain provisions, which shall be

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a part of the contract with the holders of the bonds thereby authorized, as to:

(a) pledging all or any part of the revenues derived from the leasing, sale or other disposition of a project or projects to secure the payment of the bonds, subject to such agreements with bondholders as may then exist;

(b) the rentals, fees, and other charges to be charged, and the amounts to be raised in each year thereby, and the use and disposition of the revenues;

(c) the setting aside of reserves or sinking funds, and the regulation and disposition thereof;

(d) limitations on the right of the agency to restrict and regulate the use of a project;

(e) limitations on the purpose to which the proceeds of sale of any issue of bonds then or thereafter to be issued may be applied and pledging such proceeds to secure the payment of the bonds or any issue of the bonds;

(f) the terms upon which additional bonds may be issued and secured; the refunding of outstanding or other bonds;

(g) the procedure, if any, by which the terms of any contract with bondholders may be amended or abrogated, the amount of bonds the holders of which must consent thereto, and the manner in which such consent may be given;

(h) vesting in a trustee or trustees such property, rights, powers and duties in trust as the agency may determine which may include any or all the rights, powers and duties of the trustees appointed by the bondholders and limiting or abrogating the right of the bondholders to appoint a trustee or limiting the rights, duties and powers of trustee;

(i) any other matters, of like or different character, which in any way affect the security or protection of the bonds.

§866. Notes of the agency. The agency shall have power from time to time to issue notes and from time-to-time to issue renewal notes (herein referred to as notes) maturing not later than five years from their respective original dates for any purpose or purposes for which bonds may be issued, whenever the agency shall determine that payment thereof can be made in full from any moneys or revenues which the agency expects to receive from any source. The agency may secure the notes in the same manner and with the same effect as herein provided for bonds. The notes shall be issued in the same manner as bonds. The agency shall have power to make contracts for the future sale from time-to-time of the notes, by which the purchasers shall be committed to purchase the notes from time-to-time on terms and conditions stated in such contracts, and the agency shall have power to pay such consideration as it shall deem proper for such commitments. In case of default on its notes or violation of any of the obligations of the agency to the noteholders, the noteholders shall have all the remedies provided herein for bondholders. Such notes shall be as fully negotiable as the bonds of the agency.

§868. Agreements of the municipality and state. The municipality is authorized to, and the state does hereby, pledge to and agree with the holders of the bonds or notes that neither the municipality nor the state, respectively, will limit or alter the rights, hereby vested in the agency to acquire, construct, reconstruct, improve, maintain, equip and furnish the project or projects, to establish and collect rentals, fees and other charges and to fulfill the terms of any agreements made with the holders of the bonds or notes nor in any way impair the rights and remedies of the bondholders or noteholders until the bonds or notes, together with interest thereon, with interest on any unpaid installments of interest and all costs and expenses in connection with any action or proceeding by or on behalf of the bondholders or noteholders are fully met and discharged.

§870. State and municipality not liable on bonds or notes. The bonds or notes and other obligations of the authority shall not be a debt of the state or of the municipality, and neither the state nor the municipality shall be liable thereon, nor shall they be payable out of any funds other than those of the agency.

§872. Bonds and notes as legal investment. The bonds and notes are hereby made securities in which all public officers and bodies of this state and all municipalities and municipal subdivisions, all insurance companies and associations and

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other persons carrying on an insurance business, all banks, bankers, trust companies, savings banks and savings associations, including savings and loan associations, building and loan associations, investment companies and other persons carrying on a banking business, and all other persons whatsoever except as hereinafter provided, who are now or may hereafter be authorized to invest in bonds or notes or other obligations of the state, may properly and legally invest funds including capital in their control or belonging to them. The bonds or notes are also hereby made securities which may be deposited with and shall be received by all public officers and bodies of this state and all municipalities and municipal subdivisions for any purpose for which the deposit of bonds or other obligations of this state is now or may hereafter be authorized.

§874. Tax exemptions.

(1) It is hereby determined that the creation of the agency and the carrying out of its corporate purposes is in all respects for the benefit of the people of the state of New York and is a public purpose, and the agency shall be regarded as performing a governmental function in the exercise of the powers conferred upon it by this title and shall be required to pay no taxes or assessments upon any of the property acquired by it or under its jurisdiction or control or supervision or upon its activities. Provided, however, if the agency is located within a transportation district referenced in paragraph (a) of subdivision two of section two hundred fifty-three of the tax law, it shall not be exempt from the additional tax on each mortgage of real property situated within the state imposed by such paragraph.

(2) Any bonds or notes issued pursuant to this title, together with the income therefrom, as well as the property of the agency, shall be exempt from taxation, except for transfer and estate taxes.

(3) Payments in lieu of taxes received by the agency shall be remitted to each affected tax jurisdiction within thirty days of receipt.

(4) (a) The agency shall establish a uniform tax exemption policy, with input from affected tax jurisdictions, which shall be applicable to the provision of financial assistance pursuant to section eight hundred fifty-nine a of this chapter and shall provide guidelines for the claiming of real property, mortgage recording, and sales tax exemptions. Such guidelines shall include, but not be limited to: period of exemption; percentage of exemption; types of projects for which exemptions can be claimed; procedures for payments in lieu of taxes and instances in which real property appraisals are to be performed as a part of an application for tax exemption; in addition, agencies shall in adopting such policy consider such issues as: the extent to which a project will create or retain permanent, private sector jobs; the estimated value of any tax exemptions to be provided; whether affected tax jurisdictions shall be reimbursed by the project occupant if a project does not fulfill the purposes for which an exemption was provided; the impact of a proposed project on existing and proposed businesses and economic development projects in the vicinity; the amount of private sector investment generated or likely to be generated by the proposed project; the demonstrated public support for the proposed project; the likelihood of accomplishing the proposed project in a timely fashion; the effect of the proposed project upon the environment; the extent to which the proposed project will require the provision of additional services, including, but not limited to additional educational, transportation, police, emergency medical or fire services; and the extent to which the proposed project will provide additional sources of revenue for municipalities and school districts.

(b) The agency shall establish a procedure for deviation from the uniform tax exemption policy required pursuant to this subdivision. The agency shall set forth in writing the reasons for deviation from such policy, and shall further notify the affected local taxing jurisdictions of the proposed deviation from such policy and the reasons therefor.

(5) Payments in lieu of taxes which are delinquent under the agreement or which an agency fails to remit

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pursuant to subdivision three of this section, shall be subject to a late payment penalty of five percent of the amount due which shall be paid by the project occupant (where taxes are delinquent because of the occupant's failure to make the required payment) or the agency (because of the agency's failure to remit pursuant to subdivision three of this section) to the affected tax jurisdiction at the time the payment in lieu of taxes is paid. For each month, or part thereof, that the payment in lieu of taxes is delinquent beyond the first month, interest shall accrue to and be paid to the affected tax jurisdiction on the total amount due plus a late payment penalty in the amount of one percent per month until the payment is made.

(6) An affected tax jurisdiction which has not received a payment in lieu of taxes due to it under an agreement may commence legal action in any court of competent jurisdiction directly against any person, firm, corporation, organization or agency which is obligated to make payments in lieu of taxes under an agreement and has failed to do so. In such an action, the affected tax jurisdiction shall be entitled to recover the amount due, the late payment penalty, interest, expenses, costs and disbursements together with the reasonable attorneys' fees necessary to prosecute such action. Nothing herein shall be construed as providing an affected tax jurisdiction with the right to sue and recover from an agency which has not received payments in lieu of taxes from a project occupant.

(7) Any refinancing of a project shall be subject to the provisions of section eight hundred fifty-nine-a of this chapter, except where such refinancing was previously approved pursuant to such section.

(8) Agents of an agency and project operators shall annually file a statement with the state department of taxation and finance, on a form and in such a manner as is prescribed by the commissioner of taxation and finance, of the value of all sales and use tax exemptions claimed by such agents or agents of such agents or project operators, including, but not limited to, consultants or subcontractors of such agents or project operators, under the authority granted pursuant to this section. The penalty for failure to file such statement shall be the removal of authority to act as an agent of an agency or a project operator.

(9) (a) Within thirty days of the date that the agency designates a project operator or other person to act as agent of the agency for purposes of providing financial assistance consisting of any sales and compensating use tax exemption to such person, the agency shall file a statement with the department of taxation and finance relating thereto, on a form and in such manner as is prescribed by the commissioner of taxation and finance, identifying each such agent so named by the agency, setting forth the taxpayer identification number of each such agent, giving a brief description of the property and/or services intended to be exempted from such taxes as a result of such appointment as agent, indicating the agency's rough estimate of the value of the property and/or services to which such appointment as agent relates, indicating the date when such designation as agent became effective and indicating the date upon which such designation as agent shall cease.

(b) Within thirty days of the date that the agency's designation described in paragraph (a) of this subdivision has been amended, terminated, been revoked, or become invalid or ineffective for any reason, the agency shall file a statement with the department of taxation and finance relating thereto, on a form and in such manner as is prescribed by the commissioner of taxation and finance, identifying each such agent so named by the agency in the original designation and setting forth the taxpayer identification number and other identifying information of each such agent, the date as of which the original designation was amended, terminated, revoked, or became invalid or ineffective and the reason therefor, together with a copy of the original designation.

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(10) Each agency shall develop policies for the suspension or discontinuance of financial assistance, or for the modification of any payment in lieu of tax agreement to require increased payments under circumstances as specified in the policy, which may include but shall not be limited to events of material violation of the terms and conditions of a project agreement.

(11) Each agency shall develop policies for the return of all or a part of the financial assistance provided for the project, including all or part of the amount of any tax exemptions, as specified in the policy, which may include but shall not be limited to material shortfalls in job creation and retention projections or material violations of the terms and conditions of project agreements. All such returned amounts of tax exemptions shall be redistributed to the appropriate affected tax jurisdiction, unless agreed to otherwise by any local taxing jurisdiction.

(12) Each agency shall at least annually assess the progress of each project for which bonds or notes remain outstanding or straight-lease transactions have not terminated, or which continue to receive financial assistance or are otherwise active, toward achieving the investment, job retention or creation, or other objectives of the project indicated in the project application. Such assessments shall be provided to board members.

§875. Special provisions applicable to state sales and compensating use taxes and certain types of facilities.

1. For purposes of this section: "state sales and use taxes" means sales and compensating use taxes and fees imposed by article twenty-eight or twenty-eight-A of the tax law but excluding such taxes imposed in a city by section eleven hundred seven or eleven hundred eight of such article twenty-eight. "IDA" means an industrial development agency established by this article or an industrial development authority created by the public authorities law. "Commissioner" means the commissioner of taxation and finance.

2. An IDA shall keep records of the amount of state and local sales and use tax exemption benefits provided to each project and each agent or project operator and shall make such records available to the commissioner upon request. Such IDA shall also, within thirty days of providing financial assistance to a project that includes any amount of state sales and use tax exemption benefits, report to the commissioner the amount of such benefits for such project, the project to which they are being provided, together with such other information and such specificity and detail as the commissioner may prescribe. This report may be made in conjunction with the statement required by subdivision nine of section eight hundred seventy-four of this title or it may be made as a separate report, at the discretion of the commissioner. An IDA that fails to make such records available to the commissioner or to file such reports shall be prohibited from providing state sales and use tax exemption benefits for any project unless and until such IDA comes into compliance with all such requirements.

3. (a) An IDA shall include within its resolutions and project documents establishing any project or appointing an agent or project operator for any project the terms and conditions in this subdivision, and every agent, project operator or other person or entity that shall enjoy state sales and use tax exemption benefits provided by an IDA shall agree to such terms as a condition precedent to receiving or benefiting from such state sales and use exemptions benefits.

(b) The IDA shall recover, recapture, receive, or otherwise obtain from an agent, project operator or other person or entity state sales and use exemptions benefits taken or purported to be taken by any such person to which the person is not entitled or which are in excess of the amounts authorized or which are for property or services not authorized or taken in cases where such agent or project operator, or other person or entity failed to comply with a material term or condition to use property or services in the

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manner required by the person's agreement with the IDA. Such agent or project operator, or other person or entity shall cooperate with the IDA in its efforts to recover, recapture, receive, or otherwise obtain such state sales and use exemptions benefits and shall promptly pay over any such amounts to the IDA that it requests. The failure to pay over such amounts to the IDA shall be grounds for the commissioner to assess and determine state sales and use taxes due from the person under article twenty-eight of the tax law, together with any relevant penalties and interest due on such amounts.

(c) If an IDA recovers, recaptures, receives, or otherwise obtains, any amount of state sales and use tax exemption benefits from an agent, project operator or other person or entity, the IDA shall, within thirty days of coming into possession of such amount, remit it to the commissioner, together with such information and report that the commissioner deems necessary to administer payment over of such amount. An IDA shall join the commissioner as a party in any action or proceeding that the IDA commences to recover, recapture, obtain, or otherwise seek the return of, state sales and use tax exemption benefits from an agent, project operator or other person or entity.

(d) An IDA shall prepare an annual compliance report detailing its terms and conditions described in paragraph (a) of this subdivision and its activities and efforts to recover, recapture, receive, or otherwise obtain state sales and use exemptions benefits described in paragraph (b) of this subdivision, together with such other information as the commissioner and the commissioner of economic development may require. The report required by this subdivision shall be filed with the commissioner, the director of the division of the budget, the commissioner of economic development, the state comptroller, the governing body of the municipality for whose benefit the agency was created, and may be included with the annual financial statement required by paragraph (b) of subdivision one of section eight hundred fifty-nine of this title. Such report required by this subdivision shall be filed regardless of whether the IDA is required to file such financial statement described by such paragraph (b) of subdivision one of section eight hundred fifty-nine. The failure to file or substantially complete the report required by this subdivision shall be deemed to be the failure to file or substantially complete the statement required by such paragraph (b) of subdivision one of such section eight hundred fifty-nine, and the consequences shall be the same as provided in paragraph (e) of subdivision one of such section eight hundred fifty-nine.

(e) This subdivision shall apply to any amounts of state sales and use tax exemption benefits that an IDA recovers, recaptures, receives, or otherwise obtains, regardless of whether the IDA or the agent, project operator or other person or entity characterizes such benefits recovered, recaptured, received, or otherwise obtained, as a penalty or liquidated or contract damages or otherwise. The provisions of this subdivision shall also apply to any interest or penalty that the IDA imposes on any such amounts or that are imposed on such amounts by operation of law or by judicial order or otherwise. Any such amounts or payments that an IDA recovers, recaptures, receives, or otherwise obtains, together with any interest or penalties thereon, shall be deemed to be state sales and use taxes and the IDA shall receive any such amounts or payments, whether as a result of court action or otherwise, as trustee for and on account of the state.

4. The commissioner shall deposit and dispose of any amount of any payments or moneys received from or paid over by an IDA or from or by any person or entity, or received pursuant to an action or proceeding commenced by an IDA, together with any interest or penalties thereon, pursuant to subdivision three of this section, as state sales and use taxes in accord with the provisions of article twenty-eight of the tax law. The amount of any

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such payments or moneys, together with any interest or penalties thereon, shall be attributed to the taxes imposed by sections eleven hundred five and eleven hundred ten, on the one hand, and section eleven hundred nine of the tax law, on the other hand, or to any like taxes or fees imposed by such article, based on the proportion that the rates of such taxes or fees bear to each other, unless there is evidence to show that only one or the other of such taxes or fees was imposed or received or paid over.

5. The statement that an IDA is required by subdivision nine of section eight hundred seventy-four of this article to file with the commissioner shall not be considered an exemption or other certificate or document under article twenty-eight or twenty-nine of the tax law. The IDA shall not represent to any agent, project operator, or other person or entity that a copy of such statement may serve as a sales or use tax exemption certificate or document. No agent or project operator may tender a copy of such statement to any person required to collect sales or use taxes as the basis to make any purchase exempt from tax. No such person required to collect sales or use taxes may accept such a statement in lieu of collecting any tax required to be collected. The civil and criminal penalties for misuse of a copy of such statement as an exemption certificate or document or for failure to pay or collect tax shall be as provided in the tax law. In addition, the use by an IDA or agent, project operator, or other person or entity of such statement, or the IDA's recommendation of the use or tendering of such statement, as such an exemption certificate or document shall be deemed to be, under articles twenty-eight and thirty-seven of the tax law, the issuance of a false or fraudulent exemption certificate or document with intent to evade tax.

6. The commissioner is hereby authorized to audit the records, actions, and proceedings of an IDA and of its agents and project operators to ensure that the IDA and its agents and project operators comply with all the requirements of this section. Any information the commissioner finds in the course of such audit may be used by the commissioner to assess and determine state and local taxes of the IDA's agent or project operator.

7. In addition to any other reporting or filing requirements an IDA has under this article or other law, an IDA shall also report and make available on the internet, without charge, copies of its resolutions and agreements appointing an agent or project operator or otherwise related to any project it establishes. It shall also provide, without charge, copies of all such reports and information to a person who asks for it in writing or in person. The IDA may, at the request of its agent or project operator delete from any such copies posted on the internet or provided to a person described in the prior sentence portions of its records that are specifically exempted from disclosure under article six of the public officers law.

8. In consultation with the commissioner of economic development, the commissioner of taxation and finance is hereby authorized to adopt rules and regulations and to issue publications and other guidance implementing the provisions of this section and of the other sections of this article relating to any state or local tax or fee, or exemption or exclusion therefrom, that the commissioner administers and that may be affected by any provision of this article, and any such rules and regulations of the commissioner shall have the same force and effect with respect to such taxes and fees, or amounts measured in respect of them, as if they had been adopted by the commissioner pursuant to the authority of the tax law.

9. To the extent that a provision of this section conflicts with a provision of any other section of this article, the provisions of this section shall control.

§876. Tax contract by the state. The state covenants with the purchasers and with all subsequent holders and transferees of bonds or notes issued by the agency pursuant to this title, in consideration of the acceptance of and payment for the bonds or notes, that the bonds and notes of the

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agency issued pursuant to this title and the income therefrom, and all moneys, funds and revenues pledged to pay or secure the payment of such bonds or notes shall at all times be free from taxation except for estate taxes and taxes on transfers by or in contemplation of death.

§878. Remedies of bondholders and noteholders.

(1) In the event that the agency shall default in the payment of principal or of interest on any issue of the bonds or notes after the same shall become due, whether at maturity or upon call for redemption, and such default shall continue for a period of thirty days, or in the event that the agency shall fail or refuse to comply with the provisions of this title, or shall default in any agreement made with the holders of any issue of the bonds or notes, the holders of twenty-five per centum in aggregate principal amount of the bonds of such issue then outstanding, by instrument or instruments filed in the office of the clerk of the county and proved or acknowledged in the same manner as a deed to be recorded, may appoint a trustee to represent the holders of such bonds for the purposes herein provided.

(2) Such trustee may, and upon written request of the holders of twenty-five per centum in principal amount of such bonds or notes, then outstanding shall, in his or its own name:

(a) by suit, action or special proceeding enforce all rights of the bondholders or noteholders, including the right to require the agency to collect revenues adequate to carry out any agreement as to, or pledge of, such revenues, and to require the agency to carry out any other agreements with the holders of such bonds or notes and to perform its duties under this title;

(b) bring suit upon such bonds or notes;

(c) by action or special proceeding, require the authority to account as if it were the trustee of an express trust for the holders of such bonds or notes;

(d) by action or special proceeding, enjoin any acts or things which may be unlawful or in violation of the rights of the holders of such bonds or notes;

(e) declare all such bonds or notes due and payable, and if all defaults shall be made good then with the consent of the holders of twenty-five per centum of the principal amount of such bonds or notes then outstanding, to annul such declaration and its consequences.

(3) The supreme court shall have jurisdiction of any suit, action or proceeding by the trustee on behalf of bondholders or noteholders. The venue of any such suit, action or proceeding shall be laid in the county in which the project or projects are located.

(4) Before declaring the principal of all such bonds due and payable, the trustee shall first give thirty days' notice in writing to the agency.

(5) Any such trustee, whether or not the issue of bonds represented by such trustee has been declared due and payable, shall be entitled as of right to the appointment of a receiver of any part or parts of a project, the revenues of which are pledged for the security of the bonds of such issue, and such receiver may enter and take possession of such part or parts of the project and, subject to any pledge or agreement with bondholders or noteholders, shall take possession of all moneys and other property derived from or applicable to the acquisition, construction, operation, maintenance and reconstruction of such part or parts of the project and proceed with the acquisition of any necessary real property in connection with the project that the agency has covenanted to construct, and with any construction which the agency is under obligation to do and to operate, maintain and reconstruct such part or parts of the project and collect and receive all revenues thereafter arising therefrom subject to any pledge thereof or agreement with bondholders or noteholders relating thereto and perform the public duties and carry out the agreements and obligations of the agency under the direction of the court. In any suit, action or proceeding by the trustee, the fee,

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counsel fees and expenses of the trustee and of the receiver, if any, shall constitute taxable disbursements and all costs and disbursements allowed by the court shall be a first charge on any revenues derived from such project.

(6) Such trustee shall, in addition to the foregoing, have and possess all of the powers necessary or appropriate for the exercise of any functions specifically set forth herein or incident to the general representation of bondholders or noteholders in the enforcement and protection of their rights.

§880. Actions against the agency.

(1) In an action against the agency founded upon tort, the complaint shall contain an allegation that at least thirty days have elapsed since the demand, claim or claims upon which the action is founded were presented to a member of the agency and to its secretary or to its chief executive officer, and that the agency has neglected or refused to make an adjustment or payment thereof for thirty days after the presentment.

(2) In a case founded upon tort, a notice of claim shall be required as a condition precedent to the commencement of an action or special proceeding against the agency or an officer, appointee or employee thereof, and the provisions of section fifty-e of this chapter shall govern the giving of such notice. No action shall be commenced more than one year and ninety days after the cause of action therefor shall have accrued.

§882. Termination of the agency. Whenever all of the bonds or notes issued by the agency shall have been redeemed or cancelled, and all straight-lease transactions have been terminated, the agency shall cease to exist and all rights, titles, and interest and all obligations and liabilities thereof vested in or possessed by the agency shall thereupon vest in and be possessed by the municipality.

§883. Conflicts of interest. All members, officers, and employees of an agency or industrial development authority established by this chapter or created by the public authorities law shall be subject to the provisions of article eighteen of this chapter.

§884. Public bidding. The provisions of any law relating to the requirement of public bidding with respect to the construction of public facilities or projects shall not be applicable to the acquisition, construction, reconstruction, improvement, maintenance, equipping and furnishing of projects authorized by this act.

§886. Title not affected if in part unconstitutional or ineffective. If any section, clause or provision of this title shall be unconstitutional or be ineffective in whole or in part, to the extent that it is not unconstitutional or ineffective, it shall be valid and effective and no other section, clause or provision shall on account thereof be deemed invalid or ineffective.

§888. Inconsistent provisions in other acts superseded. Insofar as the provisions of this title are inconsistent with the provisions of any other act, general or special, or of any local laws of the municipality, the provisions of this title shall be controlling except in cases of inconsistency with the Indian law.

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NEW YORK STATE

REGIONAL ECONOMIC DEVELOPMENT COUNCILS

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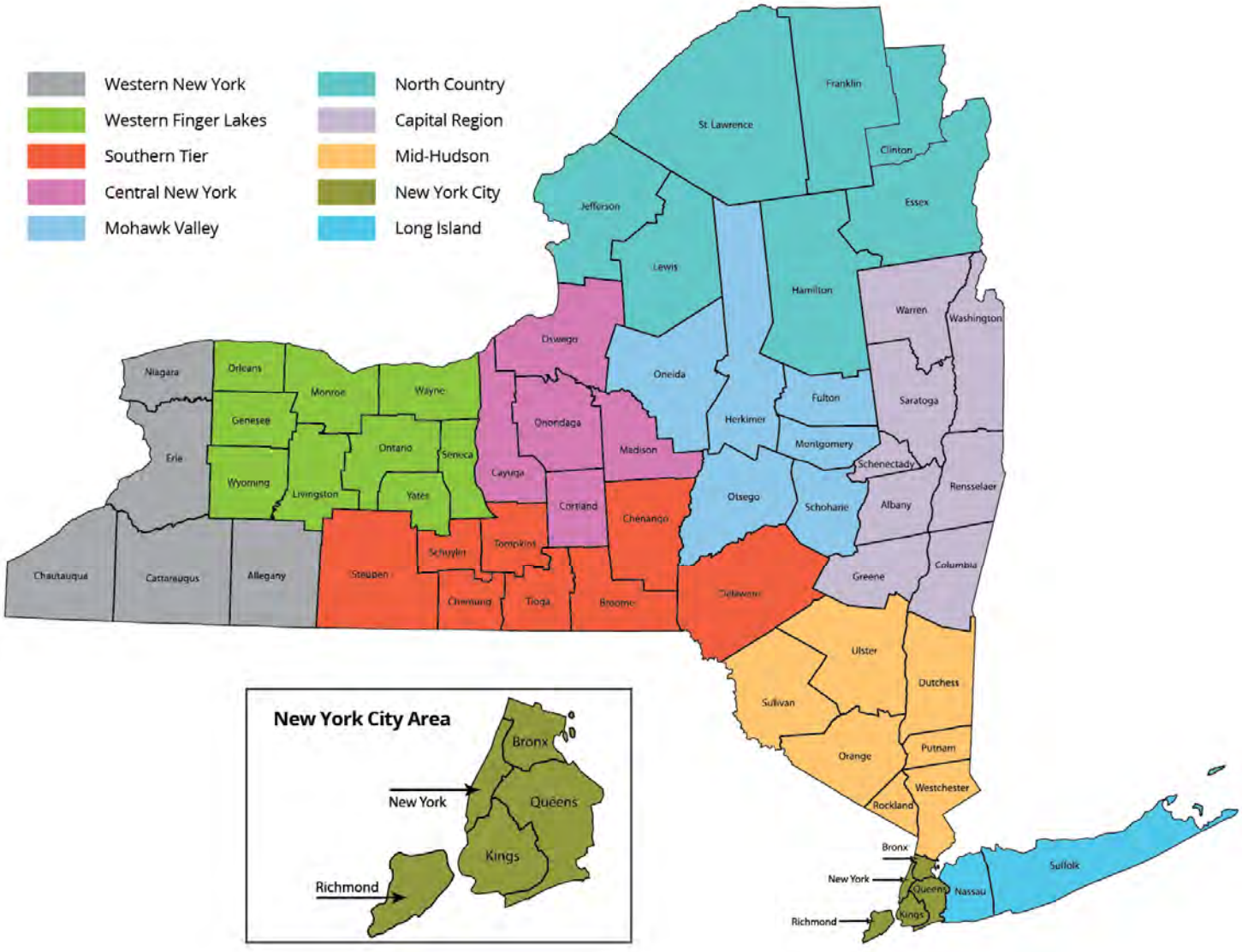

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FIVE THINGS TO KNOW ABOUT DEVELOPMENT IN CONNECTICUT

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1) **Local Government**. While you may be familiar with the eight (8) counties of Connecticut (i.e. Fairfield, New Haven, Litchfield, Hartford, Middlesex, Tolland, New London, Litchfield, and Windham), you may not know that there is no form of county government. Since 1960, Connecticut's counties are merely a geography reference. Within the county limits, there are individual towns and cities that operate as individual municipalities. In fact, Connecticut is divided into one hundred sixty-nine (169) cities and towns (each a "Municipality"). Pursuant to Chapter 98 of the Connecticut General Statutes, each Municipality has the power to, *inter alia*, establish rules or regulations of the municipality; contact; sue and be sued; take or acquire property; provide public services (including, but not limited to, police protection, fire protection, ambulance services); assess, levy and collect taxes; lay, maintain and operate sewer and drainage systems and sewage disposal plants; and keep open and safe streets, sidewalks, and public places. Each municipality has its own tax assessor, tax collector, town clerk, registrar of voters, planning and zoning officer/administrator, building official and other key administrators.

   For developers, it can be challenging as each municipality adopts its own local ordinances and regulations. A developer looking to develop in various towns would need to comply with the statutes, rules and regulations of the State of Connecticut and the ordinances and regulations of each municipality in which it builds and/or operates. For example, each municipality may adopt its own zoning regulations, as well as inland wetlands and watercourse regulations and subdivision regulations. What may be permitted under the zoning regulations of one municipality may not be permitted by another or may require a variance or special permit. In addition, each municipality has its own requirements and procedures for issuing building, demolition and other permits.

   The Municipality's Town Clerk is responsible for maintaining the land records for its particular Municipality.[1] Deeds, mortgages, easements, releases, liens, notices of lease, and other recordable documents are recorded on the land records of the municipality in which the subject real property is located. As a result, when a developer is interested in acquiring multiple properties located in different municipalities, the developer would need to conduct or obtain a title search in the municipality in which the property is located. When conveying property, the seller pays a conveyance tax to the Municipality where the property is located and the State of Connecticut Department of Revenue Services. In addition, the Town Clerk will only accept documents for recording which comply with the recording requirements set forth in Section 7-24 of the Connecticut General Statutes and are accompanied by the applicable recording fee as established by Section 7-34a.

2) **Local Taxes:** Property owners pay real property taxes, personal property taxes, and conveyance taxes (when applicable) to the Municipality where its property is located. It is important for property owners and developers to understand how real property taxes are determined. Annually, on October 1st, the Municipality publishes the grand list for the Municipality (the "Grand List") which sets forth the assessed value of all taxable property in the Municipality. The taxes, in most Municipalities, are collected in two installments paid in arrears on July 1 and January 1 of each year. However, some municipalities collect taxes quarterly, and some do not bill in arears. The real property taxes are determined by multiplying the assessed value by the mill rate.

   The mill rate is the property tax rate expressed in thousandths of the dollar. For example, a mill rate of 38.27 (the current mill rate in the Town of Monroe, Connecticut) means that the tax collector will multiply the real property's taxable assessed value by 0.03827 to determine the real property taxes payment. In this particular example, the real property owner will pay $38.27 for each $1,000 of its taxable property's assessed value. Each Municipality determines its budget for each fiscal year, including, *inter alia*, municipal salaries, education budgets, municipal services, and purchases. After deducting grants from the total expense, the remaining amount must be raised by collecting taxes. Municipalities determine the mill rate from the remaining amount needed to fund the budgeted expenses. The final budget and mill rate are ultimately adopted by a vote of the taxpayers.

1 Connecticut General Statutes Chapter 92, Sections 7-16 to 7-35z

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How is assessed value determined: All Municipalities must complete a revaluation of all properties within the Municipality every 5 years.[2] A property's assessed value is also revaluated when the property is transferred; the assessor uses the sale price to determine the current fair market value.

3) **Municipal Tax Abatements & Exemptions:** Certain properties are exempt from real property taxes pursuant to State statues. For example, certain property owned by public housing authorities are exempted from real property taxes, however, such housing authorities are required to make payments in lieu of taxes ("PILOT") to the local Municipality for four types of properties it owns: (1) moderate rental housing; (2) elderly housing; (3) state-assisted elderly congregate housing; and (4) state-assisted low income housing.[3] Similar laws are in place for properties owned by the State, the Municipality, quasi-governmental agencies, such as the South Central Connecticut Regional Water Authority, hospitals, universities and tribal land. Municipalities are, by law, entitled to reimbursement by the State for PILOT eligible properties by rates set forth in Section 12-18b of the Connecticut General Statutes.

   Municipalities offer certain tax exemptions. Typically, each Municipality will have its own application process that the taxpayer must follow to be considered for an exemption.

   Municipalities may also offer tax abatement agreements with certain persons that own or propose to acquire real property located within the Municipality. Such agreements allow the Municipality to fix the assessment of the real property and the improvements located or to be located thereon for a particular period of time. Section 12-65b of the Connecticut General Statues sets the maximum abatement and the maximum abatement period that may be offered by the Municipality based upon the cost of the improvement.

4) **Sales Tax Exemptions:** Unlike the real property taxes mentioned above, sales and use taxes are imposed at the state level.[4] Certain goods and services are exempt from sales and use taxes by statute, a complete list of which can be found in Section 12-412 of the Connecticut General Statutes or on the State of Connecticut's Department of Revenue Services webpage. In some instances, the exemption is automatic, while in others an exemption certificate is required. Developers should consult the list set forth in Section 12-412 list to determine if any of exemptions apply to its particular development, especially if the development is for housing facilities for low- or moderate-income families and persons, or tax exemption organizations.

5) **Bond Financing.** There are many avenues for tax exempt bond financing in the State of Connecticut, including bonds issued by a Municipality. Municipalities are political subdivisions of the State of Connecticut (the "State") and exist under the State constitution and State laws. Municipalities may issue bonds if authorized by resolution of the governing body of the Municipality.[5] Municipalities can issue conduit bonds on behalf of non-profit organizations to finance various activities, including capital projects such as building new facilities or making improvement to existing ones. Like any other conduit bonds, the non-profit borrower is responsible for the repayment of the bonds. The issuing Municipality secures the repayment of the bonds with an assignment of the payments to be received by the Municipality, but the Municipality has no obligation to repay the bonds. Other agencies within the State that issue conduit bonds include, *inter alia*, the Connecticut Housing Finance Authority ("CHFA"), the Connecticut Health and Educational Facilities Authority ("CHEFA") and public housing authorities.

2 Connecticut State Statute Sec. 12-62.

3 Section 8-58 of the Connecticut General Statutes.

4 Chapter 219 of the Connecticut General Statues

5 Chapter 114 of the Connecticut General Statutes (the "Connecticut City and Town Development Act").

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