

# **Local Government Property Development – In Rem Updates and Developing Renewable Energy on Municipal Brownfield/Landfill Sites**

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**LOCAL GOVERNMENT PROPERTY ACQUISITION:**  
*IN REM UPDATES AND DEVELOPING SOLAR ENERGY ON MUNICIPAL BROWNFIELD SITES*

Presented to CAASNY

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- o Team Leader of the firm's Environment and Energy Practice Team with more than 20 years of experience counseling and advocating for clients on environmental and land use issues associated with developing large-scale infrastructure, energy, and commercial projects.
- o Secures federal, state and local governmental permits and approvals; advising sellers, purchasers, lenders, and investors on environmental issues associated with corporate, real estate and energy transactions; and advocating for favorable policy decisions and legislation before Congress.
- o Expertise advising clients on projects, transactions and legal issues in New York, where he has practiced for his entire career, and on federal issues in Washington, D.C.

## OVERVIEW: WHY ARE WE DISCUSSING SOLARIZING BROWNFIELDS

- Significant new opportunities for municipalities
- Benefits counties and residents
- Supports disadvantaged communities
- Provides environmental and sustainability benefits

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## WHAT ARE BROWNFIELDS AND BRIGHTFIELDS

- What is a brownfield?
  - A property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.
- What is a brightfield?
  - The development of a solar energy project on a brownfield.

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## BENEFITS OF DEVELOPING SOLAR ON BROWNFIELDS

- Turns a vacant or underutilized property into a facility that improves the local tax base, creates jobs, and provides economic opportunities.
- Utilizes contaminated sites that are not well-suited for commercial or residential redevelopment.
- Avoids developing in greenfields (open spaces, farmlands, green spaces, etc.).
- Often suitable locations for solar (located near existing roads and energy transmission or distribution infrastructure).
- Grants and other economic and tax incentives can reduce project costs.

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## BENEFITS OF DEVELOPING SOLAR ON BROWNFIELDS

- Less project opposition; increased community and governmental support.
- No need to penetrate surface or disturb existing contamination.
- Can offset emissions from other energy sources (especially during peak hours when reliance is highest on older / greater polluting systems).
- Reduce blight by converting vacant contaminated land into productive use.
- Tax Benefits: Generates additional property taxes and increases nearby property taxes.

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## BROWNFIELDS NOT USABLE / LESS FEASIBLE FOR SOLAR

- Too heavily contaminated
- Location too far from interconnection point
- Permitting hurdles
- Significant remediation or site preparation costs
- Unworkable site controls

*Rule of Thumb: The cleaner the brownfield site, the greater the feasibility for a brightfield.*

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## TAX CREDITS TO INCENTIVIZE SOLAR DEVELOPMENT

- The Investment Tax Credit (ITC) and Production Tax Credit (PTC) allow taxpayers to deduct a percentage of the cost of renewable energy systems from their federal taxes.
  - Since 2006 enactment → 200X increased in solar energy industry
  - Dollar-for-dollar reduction in federal tax liability
    - PTC- Ongoing tax credit for first 10 years of project based on amount of energy produced
    - ITC- One-time tax credit based on investment/cost of system
  - Traditionally available only to tax paying entities . . . **Until Now**

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## INFLATION REDUCTION ACT OF 2022

- Signed into Law by President Biden on August 16, 2022.
- Called the most significant climate legislation in U.S. history
  - Offers funding, programs, and incentives to accelerate the transition to a clean energy economy
  - Drives significant deployment of new clean electricity resources.
  - Provides incentives by reducing renewable energy costs for tax paying entities and non-tax paying entities.

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## “DIRECT PAY” - MONITIZES TAX CREDIT FOR NON-TAXPAYERS

- IRA added a “Direct Pay” option.
- Allows states and political subdivisions (among other non-taxable entities) to directly monetize certain tax credits including ITC and PTC.
- Treats eligible tax credits as refundable tax payments.
- Facilitates Counties developing and owning solar systems.
- Available for tax years 2023 – 2033
- Applies to solar projects on and off brownfield sites.

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## IRA TAX ADDERS

- IRA provides for increases to tax credits on top of ITC / PTC (*i.e.*, tax adders)
  - Prevailing Wage and Apprenticeship- Brings ITC up to 30%
  - Domestic Content- 10% adder
  - Low Income Communities- 10% or 20% adder
    - Locating in low-income communities or on Indian Lands - 10% adder
    - Low-income residential or low-income economic benefit projects - 20% adder
  - Energy Communities- 10% adder

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## ENERGY COMMUNITIES

- Brownfield Category
- Statistical Area Category
  - A "metropolitan statistical area" or "non-metropolitan statistical area" that has (or had at any time after 2009):
    - 0.17% or greater employment or 25% or greater local tax revenues from extraction, processing, transport, or storage of coal, oil, or natural gas.
    - Unemployment rate at or above the prior year's national average.
- Coal Closure Category
  - A census tract (or directly adjoining census tract) where:
    - A coal mine has closed after 1999; or
    - A coal-fired electric generating unit has been retired after 2009

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## IRA DEFINITION OF BROWNFIELD

- Real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant (as defined under CERCLA (42 U.S.C. § 9601(39)(A)).
- A brownfield site does not include the categories of property described in 42 U.S.C. § 9601(39)(B).
  - Sites listed on the National Priorities List (and those proposed for listing);
  - Sites subject to planned or ongoing CERCLA, SWDA, or RCRA removal or corrective actions;
  - Sites subject to admin. or judicial orders or consent decrees under CERCLA, SWDA or other laws;
  - Sites subject to cleanup, corrective action or other orders under CERCLA, SWDA and other federal laws;
  - Disposal sites (*i.e.*, landfills) that have submitted certain closure notifications under the SWDA;
  - Petroleum impacted sites that have received funding under the federal LUST fund;
  - Sites under the jurisdiction, custody or control of the U.S. or a federal agency.

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## CONSIDERATIONS FOR MUNICIPALITIES

- Viability of Brownfield Site for Solar
- Additional Economic Incentives (*i.e.*, NY and Federal)
- Community Solar, Power Purchase Agreement or County Use
- Development, Ownership and Operations
- Overall Economic Viability

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- The firm's Litigation Practice Team Leader
- Extensive experience in business disputes and commercial litigation matters, including contract claims on behalf of both plaintiffs and defendants
- Significant experience in municipal law, which includes assisting municipalities in defending 1983 claims, resolving land use issues, drafting local laws and governance issues

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## REAL PROPERTY TAX: IT'S BORING SO WHY DO WE CARE?

- Real Property Tax Revenues are one of the largest components of County Budgets
- Tax revenues and various related economic tools drive development and growth in communities

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## REAL PROPERTY TAX: ESSENTIAL REVENUE SOURCE

- Levy: RPTL §900 et seq
- Collection: RPTL §924
- Interest: RPTL §924, 924-a. Min 12% per year; paid to city or town  
RPTL §924(3)
- Penalty: RPTL §936 – County Levies 5% on returned unpaid taxes  
(which it keeps)

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## REAL PROPERTY TAX: LEAVING MONEY ON THE TABLE

- Collection is essential
- Counties are required to make Cities and Towns whole RPTL §936
  - Cities and Towns incur no loss of revenue due to unpaid taxes as
  - County must guarantee those payments
- Small percentage of uncollected real property taxes has an outsized impact on budgets
- How to collect the unpaid taxes – several methods

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**COLLECTION OF DELINQUENT TAXES:  
IN REM PROCEEDING, JUDICIAL FORECLOSURE  
ACTION OR SALES OF TAX LIENS**

○ **In Rem Proceeding**

- Availability:
  - RPTL §1120 et seq/ Local Tax Acts - Available to municipalities only.
- Unique Vehicle
  - One proceeding for all properties
- Time: Streamlined and efficient
- Surplus Monies

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**COLLECTION OF DELINQUENT TAXES:  
IN REM PROCEEDING, JUDICIAL FORECLOSURE ACTION  
OR SALE OF TAX LIENS**

○ **Sale of Tax Lien**

- Availability:
  - RPTL §1190: tax district can sell tax liens to 3<sup>rd</sup> party for more than face value of lien.
- Time:
  - Because tax lien foreclosures must be done the same as a mortgage foreclosure, they are far less efficient than In Rem foreclosures
- Benefit:
  - Tax district can get more money per lien up front with no collection efforts

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## IN REM TAX LIEN FORECLOSURE PROCEEDING TIMELINE

- Filing of List of Delinquent Taxes
- Service of Petition and Notice of In Rem Foreclosure upon interested parties
- Redemption Date
- Answer
- Judgment of Foreclosure and Sale
- Auction
- Closing Transactions
- Surplus Money Proceedings

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## PRACTICE TIPS: WHAT TO WATCH OUT FOR

- Title Errors
- Service Errors
- Terms of Sale Infirmities
- Unexpected Property Conditions

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## NEW DEVELOPMENTS

- *Hetelkides v. County of Ontario*, 2023 WL 1973029 (2023) has resolved the spilt between the Appellate Departments and determined that a taxing authority is NOT required to open an estate and have an administrator appointed in order to commence an in rem proceeding against a property whose owner has died.
- AO/90/23 February 27, 2023 provides for a pilot program allowing remote bidding in Monroe, Niagara and Queens Counties.

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## WHAT TO WATCH

- Executive Budget proposal to amend RPTL to require surplus monies be returned to the property owner.
- Pending Legislation that would cap interest rate at 16% and create a "Homeowners Bill of Rights" (S5213/A4935) which would apply to owners of residential property with less than 4 units
  - Cannot foreclose on property subject to certain types of exemptions
  - Additional Notice Requirements/Surplus Money Requirements
- *Tyler v. Hennepin County* 7th Cir. Case holding taxing authority could keep entire surplus (granted cert to Supreme Court January 2023)

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