

## Town of Enfield Solar Energy Law

**Commented [GK1]:** See comments at the end.

### 1. Authority

This local law for the Town of Enfield, to be titled the “Solar Energy Law”, is adopted pursuant to Section 20 of the State of New York Municipal Home Rule Law to advance and protect the health, safety, and welfare of the community, and to make provision for, so far as conditions may permit, the accommodation of solar energy systems and equipment and access to sunlight necessary therefor.

**Commented [GK2]:** Generally, authority for a local law arises under § 10, and procedures arise under § 20. I would also reference Town Law § 130 and Article 16 as additional authority.

### 2. Statement of Purpose

A. This Solar Energy Law is adopted to advance and protect the public health, safety, and welfare of Town of Enfield, including:

- 1) Taking advantage of a safe, abundant, and renewable energy resource;
- 2) Decreasing the cost of energy to the owners of commercial and residential properties, including single-family houses;
- 3) Increasing the benefit of solar energy to low-to-moderate income households through community solar projects;
- 4) Protecting our environment and resources for future generations by minimizing the impacts of Solar Energy Systems on environmental resources such as important agricultural lands, forests, wildlife and other protected resources;
- 5) Managing commercial renewable energy development to provide a balance between energy needs that protect our environment and respect for our rural agricultural landscape; and
- 6) Maintaining a balance between property rights of individual landowners and the community at large.

**Commented [GK3]:** Not too sure the Union of Concerned Scientists or the Silicon Valley Toxics Coalition would agree with this adjective, but as a subjective policy declaration this is for the Town to decide.

**Commented [GK4]:** NYSDAM has agricultural guidance on this that is quite helpful.

### 3. Definitions

CEO – The Code Enforcement Officer of the Town of Enfield.

**Commented [GK5]:** Say “Building Inspector” as well as that older terminology is still used in Town Law.

GROUND-MOUNTED SOLAR ENERGY SYSTEM - A Solar Energy System that is anchored to the ground and attached to a pole or other mounting system, detached from any other

structure. A Ground-Mounted Solar Energy System shall include any Solar Thermal Energy Systems that meet the definition in the preceding sentence.

LARGE-SCALE SOLAR ENERGY SYSTEM - A Solar Energy System that feeds electricity directly into the grid, is ground mounted and is larger than four thousand (4,000) square feet in total area, including solar collectors, the enclosure and/or fence surrounding the Solar Energy System per each lot or per adjacent lots under common ownership or under common operation. A Large-Scale Solar Energy System shall include any Solar Thermal Energy Systems that meet the definition in the preceding sentence.

PERMITTEE – The party holding a Special Use Permit granted pursuant to this Solar Energy Law.

QUALIFIED SOLAR INSTALLER – A person who has skills and knowledge related to the construction and operation of solar electrical equipment and installations, and has received safety training on the hazards involved. Persons who are on the list of eligible photovoltaic installers maintained by the New York State Energy Research and Development Authority (NYSERDA), or who are certified as a solar installer by the North American Board of Certified Energy Practitioners (NABCEP), shall be deemed to be qualified solar installers for the purposes of this definition. Persons who are not on NYSEERDA's list of eligible installers or NABCEP's list of certified installers may be deemed to be qualified solar installers if the Town of Enfield determines such persons have had adequate training to determine the degree and extent of the hazard and the personal protective equipment and job planning necessary to perform the installation safely. Such training shall include the proper use of special precautionary techniques and personal protective equipment, as well as the skills and techniques necessary to distinguish exposed energized parts from other parts of electrical equipment and to determine the nominal voltage of exposed live parts.

ROOF-MOUNTED SOLAR ENERGY SYSTEM - A solar panel system located on the roof of any legally permitted building or structure for the purpose of producing electricity for onsite or offsite consumption. A Roof-Mounted Solar Energy System shall include any Solar Thermal Energy Systems that meet the definition in the preceding sentence.

SEQRA – The New York State Environmental Quality Review Act, as amended from time to time.

SOLAR ENERGY EQUIPMENT - Electrical energy storage devices, material, hardware, inverters, or other electrical equipment, infrastructure, and conduit of photovoltaic devices associated with Solar Panels and with the production of electrical energy.

SOLAR ENERGY SYSTEM - An electrical generating system composed of a combination of both Solar Panels and Solar Energy Equipment.

**Commented [GK6]:** The law is quite clear that a town can have site planning without zoning, but special permitting without zoning is not allowed. See comments and authorities cited at the end of this document. I also need to ask if there is some particular policy reason a decision was made to try to use SUPs for this type of land use application? One reason I ask is that SUP review is considerably narrower in both scope and allowable conditions than general site plan review authority.

**Commented [GK7]:** What about building mounted solar facilities that are not on the roof?

**Commented [GK8]:** "...and its implementing regulations at 6 NYCRR Part 617,"

SOLAR PANEL - A photovoltaic device capable of collecting and converting solar energy into electrical energy.

SOLAR THERMAL ENERGY SYSTEMS - Solar hot water technology consisting of solar thermal equipment and any related Solar Energy Equipment. Thermal energy is transferred to a heat transfer system via a collector and heat exchanger.

**SPECIAL USE PERMIT** - A permit issued by the Town Board pursuant to the provisions of this law for the construction and operation of a Large-Scale Solar Energy System.

**Commented [GK9]:** See above. The Town should not be using SUPs here.

STORAGE BATTERIES: Devices that store energy and make it available in an electrical form.

#### 4. Applicability

The requirements of this law shall apply to all Solar Energy Systems installed or modified after the law's effective date, excluding general maintenance and normal repairs of such Solar Energy Systems. Any repairs that are material in nature, in the judgment of the Planning Board, shall be subject to the requirements of this law. The requirements of this law must be met and a Special Use Permit issued prior to or simultaneously with the issuance of any required building permits.

**Commented [GK10]:** Why the Planning Board? And this begs the question of which Board is going to review these applications. I am seeing much overlap, and will point out a few instances as we proceed forward from here.

The installation of any Solar Energy System, as provided by this law, does not carry with it a right to a clear line of sight to the sun. It is the responsibility of the applicant, installer or developer to gain any and all permits, easements or agreements to maintain a line of sight to the sun, if necessary.

**Commented [GK11]:** I would re-phrase this to say that any project that requires a review must have a final approval in place prior to applying for, or the receipt of, any building permits. As written, it reads as if you are conditioning building permits, and that is technically not proper as they are ministerial.

#### 5. Solar as an Accessory Use or Structure

##### A. Roof-Mounted Solar Energy Systems.

- 1) Roof-Mounted Solar Energy Systems that use the electricity onsite or offsite are permitted as an accessory use when attached to any lawfully permitted building or primary structure.
- 2) Height. Notwithstanding anything in the Town of Enfield Site Plan Review Law, Local Law #2 of 2012, (the "Site Plan Review Law") to the contrary, Roof-Mounted Solar Energy Systems shall require a site plan review by the Planning Board pursuant to the provisions of the Site Plan Review Law if such Solar Energy System would result in an increase of the overall structure height by six (6) feet or more.

**Commented [GK12]:** So, are you suggesting that if an application comes along it may need both a SPR from the PB and a SUP from the TB?

- 3) Except as provided in paragraph 5.A.2) above or except as otherwise part of a project that is subject to review under Article II of the Site Plan Review Law, Roof-Mounted Solar Energy Systems that use the energy onsite or offsite shall be exempt from site plan review under the Site Plan Review Law.

**B. Ground-Mounted Solar Energy Systems.**

- 1) Ground-Mounted Solar Energy Systems, other than Large-Scale Solar Energy Systems, are permitted as accessory structures for residential use and, except as provided in paragraph 5.B.2) below or except as otherwise part of a project that is subject to review under Article II of the Site Plan Review Law, shall be exempt from any site plan review under the Site Plan Review Law.
- 2) Height. Notwithstanding anything in the Site Plan Review Law to the contrary, Ground-Mounted Solar Energy Systems shall require a site plan review by the Planning Board pursuant to the provisions of the Site Plan Review Law if such Ground-Mounted Solar Energy System would exceed twenty (20) feet in height.
- 3) Setback. Any Solar Energy Equipment and any related fencing or other enclosures shall be setback at least fifty (50) feet from the side and back lines of the property owner's lot and at least one hundred twenty five (125) feet from the centerline of any road bordering on such lot. In the event the property has no road frontage or is a flag lot, the setback shall be at least fifty (50) feet from all sides of the lot.

**C. Storage Batteries.** When Storage Batteries are included as a part of the Solar Energy System, they must be placed in a secure container or enclosure when in use. Storage Batteries no longer in use must be disposed of in a timely manner in accordance with the laws and regulations of the Town of Enfield, Tompkins County, New York State, and all other applicable laws and regulations.

**6. Approval Standards for Large-Scale Solar Systems as a Special Permitted Use**

**A. Large-Scale Solar Energy Systems** are permitted through the issuance of a Special Use Permit, subject to the requirements set forth in this Section and Section 7, including a site plan review pursuant to the provisions of the Site Plan Review Law. Notwithstanding anything in the Site Plan Review Law to the contrary, applications for the installation of a Large-Scale Solar Energy System shall be reviewed by the Planning Board and referred, with comments, to the Town Board for its review and action, which can include approval, approval with conditions, or denial.

**Commented [GK13]:** Aside from the validity question for SUPs when there is no zoning, I am having trouble fathoming the purpose here. I get that the Town does not want solar-only projects subjected to more robust reviews unless they exceed 6' in added height or unless the underlying project is already subjected to review, but it seems odd to take the planning function for this one item away from the very board—the planning board—which has the site planning experience to do this work.

There is also a secondary legal issue here, as the Town has already delegated site plan review authority to its Planning Board, such that withholding or taking back that authority would require different language and perhaps even an amendment to Local Law #2 of 2012.

Given these issues, I am not sure what the intent here was, as on some levels it seems that the town board does not want the Planning Board reviewing these applications, and that simply seems a tad odd to me (though perhaps the issue is not wanting *only* the planning board to do reviews).

Now, might be able to create a special review board for this, but the question again will devolve to "why."

**Commented [GK14]:** Still confused here.

B. Special Use Permit Application Requirements for a Special Use Permit. The site plan application process under the Site Plan Law is to be used as supplemented by the following provisions:

- 1) If the property of the proposed project is to be leased, legal consent between all parties, specifying the use(s) of the land for the duration of the project, including full and complete copies of any leases, easements and other agreements, shall be submitted.
- 2) Site Plans showing the layout of the Solar Energy System signed by a registered professional engineer licensed in the State of New York, who shall be reasonably acceptable to the Town Board, shall be required.
- 3) The equipment specification sheets shall be documented and submitted for all significant components, including but not limited to, photovoltaic panels, mounting systems, and inverters that are to be installed.
- 4) A Property Operation and Maintenance Plan shall be submitted. Such plan shall describe continuing photovoltaic maintenance and property upkeep, such as mowing and trimming. All chemical herbicides proposed to be used in the project shall be listed in the Property Operation and Maintenance Plan and are subject to final approval by the Town Board.
- 5) Projected production plans showing the annual amount of energy that will be generated and transmitted for each one year period during the life of the project.
- 6) A glare assessment survey and a complaint and mitigation plan reasonably acceptable to the Town Board to address glare on other parcels of land on an ongoing basis during the life of the project.
- 7) A Decommissioning Plan shall be submitted. See Abandonment and Decommissioning in Section 7.B.
- 8) A general complaint plan, with a procedure for determining mitigation, that is reasonably acceptable to the Town Board shall be submitted.
- 9) No Special Use Permit may be transferred to a new owner and/or operator of a Large-Scale Solar Energy System without the prior approval of the Town Board. Such approval shall be conditioned upon a written assumption by the new owner and/or operator of any and all requirements imposed upon the original owner and/or operator, including, without limitation, evidence that the

**Commented [GK15]:** I think I get that you are trying to say that the site plan issues that may be reviewed are incorporated into the special use permit system, but I am not sure this says that. It is infinitely better to specifically list each standard as: (i) such is required by the NYS Constitution for local laws and statutes generally; and (ii) SUPs are far more limited than site planning, and the law is that if the SUP standard is not set forth clearly in the law, then it does not apply (and for purposes of this comment, I am tackling structure issues as a SUP is not an available tool here).

**Commented [GK16]:** How about "If the project is to be located upon lands owned by a third party, then proof of appropriate rights of use for the project duration shall be submitted in their full and complete form, whether they are licenses, easements, leases, or other rights in title or estates in land."

**Commented [GK17]:** Is the Town saying it can determine who an applicant's engineer is or should be? Not sure, particularly if they hold a NYS license, that a Town can do that. You can, however, reserve the right to have an applicant's engineering drawings, opinions, or conclusions reviewed by an engineer hired by the Town, and you can, within certain limits, require the applicant to pay for or contribute to the expense of such expert review.

**Commented [GK18]:** Do you wish to specify non-toxic oils or coolants only? Some use plain vegetable oil these days.

**Commented [GK19]:** What is this? Are you saying that if the project is allowed, build per approvals and codes, and 8 years later Mr. Smith buys a home in the neighborhood and complains, that the owner of the facility has to try to mitigate Mr. Smith's concerns?

And if Mr. Smith can never be satisfied, then what? Is the Town going to determine what is reasonable and risk being sued by both sides?

I think I need to know more about what is here envisioned and what the legislative goal of a provision like this is, as well as what specific aspect of the police power this serves, since this looks more like policy than law.

new owner and/or operator has either assumed the existing financial surety required under Section 7.B. or has secured an equivalent financial surety, reasonably acceptable to the Town Board, in its place. Failure to comply with these requirements will be deemed an abandonment of the Large-Scale Solar Energy System pursuant to Section 7.B. shall be subject to the terms and provisions of Section 7.B. as such.

C. Special Use Permit Standards.

- 1) Height. Large-Scale Solar Energy Systems shall not exceed twenty (20) feet in height unless a variance is recommended by the Planning Board pursuant to the standards set forth in Section 3.1 of the Site Plan Review Law and approved by the Town Board.
- 2) Setbacks. Any Solar Energy Equipment and any related fencing or other enclosures of a Large-Scale Solar Energy System shall be setback at least fifty (50) feet from the side and back lines of the property owner's lot and at least one hundred twenty five (125) feet from the centerline of any road bordering on such lot. In the event the property has no road frontage or is a flag lot, the setback shall be at least fifty (50) feet from all sides of the lot.
- 3) Lot Size. Large-Scale Energy Systems shall be located on lots with a minimum lot size of 5 acres.
- 4) Lot Coverage. The enclosed or fenced in area of a Large-Scale Solar Energy System shall not exceed 60% of the lot on which it is installed.
- 5) Storage Batteries. When storage Batteries are included as a part of the Solar Energy System, they must be placed in a secure container or enclosure when in use. Storage Batteries no longer in use must be disposed of in a timely manner in accordance with the laws and regulations of the Town of Enfield, Tompkins County, New York State, and all other applicable laws and regulations.
- 6) Fencing. All Large-Scale Solar Energy Systems shall be enclosed by fencing to prevent unauthorized access. Warning signs with the emergency contact information shall be placed on the entrance and perimeter of the fencing as required in the judgment of the Planning Board and approved by the Town Board. The type of fencing shall be recommended by the Planning Board and approved by the Town Board. The fencing shall be a maximum of 8 feet and a minimum of 6 feet in height.

**Commented [GK20]:** PBs have no authority to issue variances. Moreover, to the extent waivers can apply, we are again smack dab back to site planning standards, not SUP standards.

**Commented [GK21]:** These are zoning standards, are you intending to create a Zoning Board of Appeals? I suspect not.

- 7) Screening. The Planning Board may recommend further screening by landscaping to avoid adverse aesthetic impacts.
- 8) Utility Connections. To the extent reasonably practicable, all utility connections for any Large-Scale Solar Energy Systems shall be placed underground, depending upon the appropriate soil conditions, shape and topography of the site and any requirements of the utility provider. Electrical transformers for utility connections may be above ground if required by the utility provider.
- 9) Lighting. The Town Board may permit motion-activated or staff-activated security lighting around the equipment of a Large-Scale Solar Energy System or accessory structure provided such lighting does not project off the site. Such lighting should only be activated when the area within the fenced perimeter has been entered. Lighting shall be limited to that minimally required for safety and operational purposes and shall be reasonably shielded and downcast from abutting properties.
- 10) Liability Insurance during Construction. The developer of a Large-Scale Solar Energy System shall provide proof of liability insurance with a minimum coverage requirement of \$1 million per occurrence and a \$2 million aggregate coverage, that names the Town of Enfield as an additional named insured party, during the construction period of the project.
- 11) Liability Insurance during Operation. The owner and/or operator of a Large-Scale Solar Energy System shall provide annual proof of liability insurance with a minimum coverage requirement of \$1 million per occurrence and a \$2 million aggregate coverage, that names the Town of Enfield as an additional named insured party, during the operational period of the project.
- 12) Site Plan Review. Notwithstanding anything to the contrary in the Site Plan Review Law, any application under this Section shall meet any substantive provisions contained in site plan requirements of the Site Plan Review Law that, in the judgment of the Planning Board, as approved by the Town Board, are applicable to the system being proposed. In addition, notwithstanding anything to the contrary in the Site Plan Review Law, the Planning Board may recommend waivers pursuant to the standards set forth in Section 3.1 of the Site Plan Review Law or any successor provisions which must then be approved by the Town Board.
- 13) SEQRA. Permit applications shall be deemed Type I projects under SEQRA. In fulfilling the requirements of the SEQRA, the Town Board may require a Full Environmental Assessment Form for the proposed Large-Scale Solar Energy System.

**Commented [GK22]:** Clearly, I am seeing that site planning is also going to occur—am I reading this correctly? Is it the Town's intent to discourage solar energy? I ask as requiring multiple reviews with overlapping conditions and adding that expense to applicants, as well as undergoing the risk of inconsistent determinations, seems like it is designed to, or will in fact specifically, discourage this form of energy. Again, I ask as this reflects, or seems to reflect, some policy determination and not a legal issue (though the inability to use SUPs still applies as a legal restraint).

**Commented [GK23]:** All lighting generally projects off-site. It may be better to require IDSA compliance or a duty to properly mitigate fugitive light and light trespass. I think this is the intent when you use the phrase "reasonably shielded and downcast" as you then are talking about the luminaire and not the light.

**Commented [GK24]:** You might need to expand this to a general site plan standard. Alternately, there are a lot of issues with this simple a recitation as insurance only covers covered losses and is not indemnity, and insurance can cross-over to indemnity with additional insurance requirements, such as requiring completed operations and contractual liability coverages. However, this is best done as a general site planning standard, so I think going further here might first await resolution of the policy issues.

**Commented [GK25]:** Same.

**Commented [GK26]:** A Town Board, once it delegates site planning authority to a Planning Board, retains no authority to review, approve, or act as an appellate body to oversee site planning determinations. There are not only cases that say this, but Town Law § 274-a has been expressly held to preempt this as the Courts are expressly given exclusive review authority.

**Commented [GK27]:** Indeed correct, as mentioned earlier.

**Commented [GK28]:** If it is Type I, then a FEAF is mandated.



14) Notifications. Notwithstanding anything to the contrary in the Site Plan Review Law or SEQRA, any notifications required pursuant to the Site Plan Review Law or SEQRA with respect to any Solar Energy System shall be sent to all landowners within one mile of the boundary of the parcel on which the proposed site is located.

**Commented [GK29]:** That is a potentially huge burden and I am not seeing that one-mile might be a reasonable impact zone should, for example, a challenge arise. For example, to challenge under SEQRA or permitting, one must have standing, which requires particular harm, and thus often requires direct proximity, etc.

15) Qualified Solar Installer. The project must be installed by a Qualified Solar Installer.

16) Every Solar Energy System shall be built, operated and maintained to acceptable Industry standards, including but not limited to the most recent, applicable standards of the Institute of Electric and Electronic Engineers ("IEEE") and the American National Standards Institute ("ANSI").

17) In order to verify that the Solar Energy System's owners and any and all lessees, renters and/or operators of the Solar Energy System place, construct, modify and maintain such Systems, including solar collectors and solar inverters, in accordance with all applicable technical, safety, fire, building codes, laws, ordinances and regulations and other applicable requirements, the Town may inspect all facets of said System's placement, construction, modification and maintenance. Any inspections required by the Planning Board or Town Board that are beyond its scope or ability shall be at the expense of the applicant and/or the operator of the System.

**Commented [GK30]:** This should be part of an "inspection fee" protocol and not an open-ended expense. It may not be enforceable as such as an applicant is entitled to know the costs of review and compliance.

18) Other. The Town Board may impose conditions on its approval of any Special Use Permit under this Section in order to enforce the standards referred to in this Section or in order to discharge its obligations under SEQRA. Notwithstanding anything to the contrary in the Site Plan Review Law, the Town Board shall be designated the lead agency and the Planning Board shall be designated an interested party for purposes of any such SEQRA review unless the Town Board determines otherwise.

**Commented [GK31]:** SUP conditions may ONLY be imposed in connection with requirements set forth in the implementing zoning ordinance or local law.

Generalized conditions are better managed as within the province of site planning.

**Commented [GK32]:** If the PB is issuing a site plan review, then by definition the PB is an involved party.

D. Large-Scale Solar Energy Systems shall not be located in the following areas unless otherwise approved by the Town Board in conjunction with the Special Use Permit approval process provided in this section:

**Commented [GK33]:** This is legally contradictory. In order to undergo site plan review or special permitting the use MUST first be a use allowed as of right. Here, again, this is a zoning standard and you may well need a BZA to make this provision work if you are going to zone land uses in the Town in this fashion. Again, this seems like a policy issue is here controlling, as it is equally plausible that the SUP terminology is not here being used properly and the Town's intent is actually different than I may be reading or supposing.

1) Prime farmlands soils as identified by the USDA-NRCS or alternative available resources;

2) Areas of potential environmental sensitivity, including Unique Natural Areas as designated by the Tompkins County Environmental Management Council, flood plains, historic sites, airports, state-owned lands, conservation easements,



trails, parkland, prime soils, and wetlands as identified by Tompkins County Planning Department mapping services, the New York State Department of Environmental Conservation or the United States Army Corps of Engineers; and

- 3) On slopes of greater than fifteen percent (15%), unless the applicant can demonstrate through engineering studies and to the satisfaction of the Town Board that the proposed development will cause no adverse environmental impact that will not be satisfactorily mitigated.

- E. The Town Board, at the expense of the applicant, may employ its own consultant(s) to examine the application and related documentation and make recommendations as to whether the criteria for granting the Special Use Permit has been met, including, but not limited to, whether the applicant's conclusions regarding safety analysis, visual analysis, structural inspection, and storm water management aspects are valid and supported by generally accepted and reliable engineering and technical data and standards.

**Commented [GK34]:** I did not see all of these standards spelled out in this local law.

**7. Abandonment and Decommissioning**

- A. Applicability and purpose. This section governing abandonment and decommissioning shall apply to Large-Scale Solar Energy Systems. It is the purpose of this section to provide for the safety, health, protection and general welfare of persons and property in the Town of Enfield, by the Town requiring abandoned Large-Scale Solar Energy Systems to be removed pursuant to a decommissioning plan. The anticipated useful life of such systems, as well as the volatility of the recently emerging solar industry where multiple solar companies have filed for bankruptcy, closed or been acquired creates an environment for systems to be abandoned, thereby creating a negative visual impact on the Town. Abandoned commercial systems may become unsafe by reason of their energy-producing capabilities and serve as an attractive nuisance.

**Commented [GK35]:** They also leak some surprisingly toxic substances (review cadmium telluride) and create serious solid waste problems. These have been the two biggest problems in the American Southwest, where many of these systems have already aged out.

- B. Abandonment. A Large-Scale Solar Energy System shall be deemed abandoned if the system fails to generate and transmit electricity over a continuous period of one year at a rate of at least 25% of its projected production based on the application approved by the Town Board for the project. A Large-Scale Solar Energy System also shall be deemed abandoned if following site plan approval construction of the system is not completed within 18 months of issuance of the first building permit for the project.

**Commented [GK36]:** This is questionable as the Town cannot regulate the business itself and, in my opinion one year is way too long.

**Commented [GK37]:** This is better set forth in a stand-alone sunset clause.

- 1) Extension of time. The time at which a Large-Scale Solar Energy System shall be deemed abandoned may be extended by the Town Board for an additional

period of up to one year, provided the system owner presents to the Board a viable plan, reasonably acceptable to the Town Board, outlining the steps and schedules for placing the system in service or back in service within the time period of the extension. An application for an extension of time shall be made to the Town Board by the Large-Scale Solar Energy System owner and/or operator prior to abandonment as defined herein. Extenuating circumstances as to why the Large-Scale Solar Energy System has not been operating or why construction has not been completed may be considered by the Board in determining whether to grant an extension.

C. Removal required. A Large-Scale Solar Energy System which has been abandoned shall be decommissioned and removed. The Large-Scale Solar Energy System owner and/or owner of the land upon which the system is located shall be held responsible to physically remove all components of the system within one year of abandonment. Removal of the Large-Scale Solar Energy System shall be in accordance with a decommissioning plan approved by the Town Board.

D. Decommissioning and Removal.

- 1) Decommissioning and removal of a Large-Scale Solar Energy System shall consist of:
  - (a) Physical removal of all above ground and below ground equipment, structures and foundations, including but not limited to all solar arrays, buildings, security barriers, fences, electric transmission lines and components, roadways and other physical improvements to the site related to the Large-Scale Solar Energy System;
  - (b) Disposal of all solid and hazardous waste in accordance with local, state and federal waste disposal regulations;
  - (c) Restoration of the ground surface and soil;
  - (d) Stabilization and revegetation of the site with native seed mixes and/or plant species (excluding invasive species) to minimize erosion.
- 2) Upon petition to the Town Board, the Board shall permit the system owner and/or landowner to leave certain underground or above ground improvements in place, provided the owner can show that such improvements **are part of a plan to redevelop the site**, are not detrimental to such redevelopment, and do not adversely affect community character or the environment.

**Commented [GK38]:** Not sure this standard really matters—if a farmer wants to keep a road or a culvert crossing, what does the town care?

E. Special Use Permit conditions. The following conditions shall apply to all Special Use Permits issued for a Large-Scale Solar Energy System. No Special Use Permit shall be issued unless the Town Board finds that the conditions have been or will be met.

**Commented [GK39]:** Why is this here and not part of, or referenced in § 6(c)?

1) Decommissioning plan. All applications for a Large-Scale Solar Energy System shall be accompanied by a decommissioning plan to be implemented upon abandonment and/or in conjunction with removal of the system. The decommissioning plan shall address those items listed in the above section and include:

- (a) An estimate of the anticipated operational life of the system;
- (b) Identification of the party responsible for decommissioning;
- (c) Description of any agreement with the landowner regarding decommissioning;
- (d) A schedule showing the time frame over which decommissioning will occur and for completion of site restoration work;
- (e) A certified and sealed cost estimate prepared by a qualified structural engineer or professional engineer, who shall be reasonably acceptable to the Town Board, estimating the full cost of decommissioning and removal of the solar PV system, including, but not limited to, the cost of solid waste disposal and the cost to clean-up any hazardous waste leakage on the property. The Town Board shall have the sole discretion to require a structural engineer or a professional engineer and regardless of which type of engineer is chosen, such engineer shall be licensed by the State of New York. The Town Board shall have the right, in its sole discretion, to have this estimate reviewed by an independent structural engineer at the system owner's and/or operator's expense;
- (f) A financial plan to ensure that financial resources will be available to fully decommission the site.

**Commented [GK40]:** One could likely never know this number.

1) Financial surety. Prior to the issuance of a building permit and every two years thereafter, the Large-Scale Solar Energy System owner and/or operator shall file with the Town evidence of financial security to provide for one hundred twenty five percent (125%) of the full cost of decommissioning and removal of the solar PV system, which amount shall automatically be increased by two percent (2%) the following year, in the event the system is not removed by the system owner and/or landowner. Evidence of financial security shall be in effect throughout the life of the system and shall be, in the sole discretion of the Town Board, either in the form of an irrevocable letter of credit or cash security acceptable to the Town Board. The irrevocable letter of credit shall include an auto extension provision if possible, to be issued by an A-rated institution solely for the benefit of the Town

**Commented [GK41]:** Should be a demand instrument written under ISC-98 or, preferably, UGC, and drawn by a simple sight draft demand. The Town would probably want an evergreen clause covering a set period of time, such as the 2-year period herein referenced, or the life of the project (but a 30-year LOC is not likely to be underwritten, and that is why bonds are more common here).

Also, is there a reason the Town could not want a surety or removal bond? Yes, they are harder to collect, but it may not be possible to get a LOC issued and underwritten on all these terms.

and for the benefit of the landowner if the land is leased to the operator of the system. Any letter of credit shall provide that issuer shall notify the Town in the event such letter of credit is canceled or otherwise terminated. The Town shall be entitled to draw on the letter of credit in the event that the Large-Scale Solar Energy System owner and/or landowner is unable or unwilling to commence decommissioning activities within the time periods specified herein. In the event a demand for decommissioning is made by the Town to a landowner that leases his or her property to the operator of the system, such landowner may also be entitled to draw on such letter of credit if the owner and/or operator of such system is unable or unwilling to commence decommissioning activities within the time periods specified herein. No other parties, including the owner and/or operator shall have the ability to demand payment under the letter of credit. Upon completion of decommissioning, the owner and/or landowner may petition the Town to terminate the letter of credit. In the event ownership of the system is transferred to another party, the new owner (transferee) shall file evidence of financial security with the Town at the time of transfer, and every two years thereafter, as provided herein. Failure to keep a surety in place as required by this law shall result in the revocation of the Special Use Permit and the termination of the project unless and until such surety is restored; provided, however, that any lapse of a surety in excess of 180 days shall be deemed an abandonment of the project pursuant to Section 7.F. herein and subject to complete decommissioning in accordance with this law.

**Commented [GK42]:** Not unless the LOC states this, and you need to decide on the type of LOC you will accept.

2) Amount. The amount of the surety shall be determined by the Town Board based upon a current estimate of decommissioning and removal costs as provided in the decommissioning plan and subsequent bi-annual reports required pursuant to paragraph 3 below. For purposes of this determination, the any bi-annual decommissioning report shall be required to meet the same requirements set forth in Section 7.E.1.e. as the original decommissioning cost estimate. The amount of the surety shall be adjusted by the Town Board as appropriate upon receipt of a bi-annual report containing an updated cost estimate for decommissioning and removal.

**Commented [GK43]:** Make sure your decommissioning cost estimates do not subtract out the recycling value of the steel and materials, as this can be quite problematic and is a very common industry standard, well-pitched by solar landmen.

3) Annual report. The Large-Scale Solar Energy System owner and/or operator shall on a yearly basis provide the Town Clerk a report showing the rated capacity of the system and the amount of electricity that was generated by the system and transmitted to the grid over the most recent twelve-month period compared to the amount of energy that was projected to be generated in the application approved by the Town Board. The Town Clerk shall forward such report to the Town Board and the CEO within 5 business days of receipt of the report. The report shall also identify any change in ownership of the Solar Energy System and/or the land upon which the system is located and shall identify any change in the party responsible for decommissioning and removal of the system upon its abandonment. The annual report shall be submitted no later than 45 calendar days after the end of the calendar year. Every second year, to coincide with the filing of evidence of financial security, such report

shall also include a recalculation of the estimated full cost of decommissioning and removal of the Large-Scale Solar Energy System in accordance with the provisions of this Section 7. The Town shall require an adjustment, as appropriate, in the amount of the surety to reflect any changes in the estimated cost of decommissioning and removal. Failure to submit a report as required herein shall be considered a violation of Section 7 of this Solar Energy Law.

F. Decommissioning and removal by Town. If the Large-Scale Solar Energy System owner and/landowner fails to decommission and remove an abandoned facility in accordance with the requirements of this section, the Town may enter upon the property to decommission and remove the system.

1) Procedure

- (a) Upon a determination by the Town Board that a Large-Scale Solar Energy System has been abandoned, the CEO shall notify the system owner, landowner and permittee by certified mail: (a) in the case of a facility under construction, to complete construction and installation of the facility within 180 calendar days; or (b) in the case of a fully constructed facility that is operating at a rate of less than 25% of its projected production level as outlined in the application approved by the Town Board, to restore operation of the facility to no less than 80% of rated capacity within 180 calendar days, or the Town Board will deem the system abandoned and commence action to revoke the Special Use Permit and require removal of the system.
- (b) Being so notified, if the system owner, operator, landowner and/or Permittee fails to perform as directed by the CEO within the 180 day period, the CEO shall notify the system owner, operator, landowner and permittee, by certified mail, that the Large-Scale Solar Energy System has been deemed abandoned and the Town intends to revoke the Special Use Permit within 60 calendar days of mailing said notice. The notice shall also state that the Permittee is entitled to appeal the decision of the Town Board pursuant to Article 78 of the New York Civil Practice Laws and Rules.
- (c) Upon a determination by the Town Board that a Special Use Permit has been revoked, the decommissioning plan must be implemented and the system removed within one year of having been deemed abandoned or the Town may cause the removal at the owner and/or landowner's expense. If the owner and/or landowner fails to fully implement the decommissioning plan within one year of abandonment, the Town may

**Commented [GK44]:** This will become problematic. You can never achieve 80% in older systems without panel replacements as there are only so many electrons that can be replaced by photons before the compound used in the ribbon or panel ceases to be and remain efficient. Moreover, a volcanic eruption can even affect these percentages. Finally, again, it is not proper to regulate the business itself, but only its land use impacts.

**Commented [GK45]:** Got it, but timing needs to be tuned. If the permit is not revoked, what forces decommissioning?

collect the required surety and use said funds to implement the decommissioning plan.

Commented [GK46]: Same.

- (d) Removal by Town and reimbursement of Town expenses. Any costs and expenses incurred by the Town in connection with any proceeding or work performed by the Town or its representatives to decommission and remove a Large-Scale Solar Energy System, including legal costs and expenses, shall be reimbursed from the financial surety posted by the system owner or landowner as provided in section 7.D. Decommission and Removal Plan herein. Any costs incurred by the Town for decommissioning and removal that are not paid for or covered by the required surety, including legal costs, shall be assessed against the property, shall become a lien and tax upon said property, shall be added to and become part of the taxes to be levied and assessed thereon, and shall be enforced and collected, with interest, by the same officer and in the same manner, by the same proceedings, at the same time and under the same penalties as are provided by law for the collection and enforcement of real property taxes in the Town.

Commented [GK47]: There are some due process aspects to this that should be considered. For example, a landowner may not wish to challenge decommissioning, but may object to the Town claiming it cost \$30,000. I would also clearly separate the right to proceed against any security posted and the right to make a claim for removal expenses from the landowner, and make both independent options not subject to an election or remedies defense, etc. In other words, the Town can choose one or both such options, and in any order and at any time, even simultaneously.

8. Enforcement

Any violation of this law shall be fully subject to the enforcement provisions of Section 5.3 of the Site Plan Review Law or any successor provisions thereunder; provided, however, that in lieu of the monetary fines and/or civil penalties specified in Section 5.3 of the Site Plan Review Law for a First, Second or Third Violation, the monetary fines and/or civil penalties for any such violations shall be Five Hundred Dollars (\$500) per day. For this purpose, any reference to "this Local Law" in Section 5.3 of the Site Plan Review Law shall be deemed to include a reference to this Solar Energy Law as well.

Commented [GK48]: Per the NYS Constitution you cannot incorporate standards like this. The penalties and fines, including whether civil or criminal or both, should be stated within this local law.

9. Fees and Escrow

A fee, as determined by the Town Board, shall accompany the application for a Large-Scale Solar Energy System. The amount of such required Large-Scale Solar Energy System fees may be revised from time to time by the Town Board in the future by resolution.

Commented [GK49]: This should be specified as an application fee and separated from an escrow deposit for expert review services.

The applicant shall deliver with its application an amount as determined by the Town Board from time to time by resolution or as specifically agreed upon between the Town and the applicant to be held in escrow during the application review process. The sum shall be held by the Town in a non-interest bearing account and these funds shall be available to the Town to pay consultants engaged by the Town to assist in any review of the application. Following grant or denial of the application, the Town shall return to the applicant any excess remaining in escrow. If the escrow account has been depleted prior to grant or denial of the application,

the applicant shall deposit such funds as are then necessary for the Town to pay any outstanding fees before the Town is required to proceed with any further review of the project.

#### 10. Host Community or PILOT Agreement

Nothing in this Law shall be read as limiting the ability of the Town Board to enter into host community agreements or Payment in Lieu of Taxes (PILOT) agreements with any applicant to compensate the Town for expenses or impacts on the community.

#### 11. Severability

The invalidity or unenforceability of any section, subsection, paragraph, sentence, clause, provision or phrase of the aforementioned sections as declared by the valid judgment of any court of competent jurisdiction to be unconstitutional shall not affect the validity or enforceability of any other section, subsection, paragraph, sentence, clause, provision or phrase, which shall remain in full force and effect.

### ENDNOTES:

As to SUPs, here is what Town Law § 274-b(1) says:

1. Definition of special use permit. As used in this section the term "special use permit" shall mean an authorization of a particular land use which is permitted in a zoning ordinance or local law, subject to requirements imposed by such zoning ordinance or local law to assure that the proposed use is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such requirements are met.

Thus, by definition a SUP applies to a use permitted in a zoning ordinance or zoning local law. SUPs are generally creatures of zoning. Site planning, by contrast, does not address zoning per se and does not need a § 261-based land use law to authorize its use. Comparatively, here is what § 274-a(1) says:

1. Definition of site plan. As used in this section the term "site plan" shall mean a rendering, drawing, or sketch prepared to specifications and containing necessary elements, as set forth in the applicable zoning ordinance or local law, which shows the arrangement, layout and design of the proposed use of a single parcel of land as shown on said plan. Plats showing lots, blocks or sites which are subject to review pursuant to authority provided for the review of subdivisions under section two hundred seventy-six of this article shall continue to be subject to such review and shall not be subject to review as site plans under this section.

As you can see, site planning is not specifically tied to allowed uses and zoning, but has to do with general site and lot development. Moreover, landowners are allowed to get area variances to get exceptions to and relief from SUPs and their conditions, again proving this tie-in between SUPs and zoning. See e.g., Real Holding Corp. v. Lehigh, 304 A.D.2d 583, (2d Dept 2003), aff'd, 2 N.Y.3d 297 (2004). Additionally, the standard of review for SUPs is to examine whether granting the same would be in harmony with the existing zoning, and



DRAFT 12-4-2018

neighborhood impact, as in site planning, is a key feature (including to address in site or project mitigation).

To illustrate this further, I attach an Ontario County summary and a direct declaration on this issue from NYS from the former NYSDOS specialist on Local Government. Even the NYS Series on land use covers special permitting in its BZA Pamphlet. As noted by NYSDOS:

"A Special Use Permit (SUP) is a regulatory control tool that is used in conjunction with zoning, and a municipality must have zoning in order to use special use permits. A special use permit is sometimes referred to as conditional use, special permit, or special exception."

Hence, I have not yet attempted to draft or re-draft any language or terms herein as the concept of a SUP and its revocation seemed a central policy theme, and this issue may need to be revisited or reconsidered as how and whether to encourage and regulate solar siting and approvals is, in the first instance, a policy issue. Overall, I think I get the gist of what is being aimed at and believe a re-draft using enhanced site plan review would work.

However, whether to have a committee or a particular person start to implement such changes is for the Town to decide in the first instance. If I were asked to do it, I would want to grasp the policy issues raised and believe this would take several hours given both the procedural and substantive changes that would need to be addressed.

Thanks.