

Notes

Local Restrictions on Renewable Energy Siting in the United States

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Climate change has arrived. The next decade will provide critical opportunities to avoid the most devastating impacts of climate change. The decisions we take over the next ten years will be the difference between moderate levels of warming and warming that will cause catastrophic changes to the planet. To avoid the most devastating impacts of climate change, the United States must rapidly transition the energy sector to almost entirely renewable energy. Notwithstanding the rapid growth of renewable energy over the past decade, the United States must add renewable capacity at an unprecedented rate. To meet this challenge, many states have set aggressive renewable energy targets for their electricity sectors. In the push for a transition to renewable energy, the question remains: where will it all go? Many people like the idea of clean energy in their state but would prefer that the facilities not be located near them. Thus, in response to the push for clean energy, many local governments and municipalities have enacted laws restricting the siting of renewable energy projects. Left unchecked, these local restrictions may prevent states from reaching their renewable energy targets. State-level renewable energy siting programs offer centralized decisionmaking for renewable energy projects and can preempt local laws that are overly restrictive. This Note focuses on using state preemption of local laws to promote the development of new renewable energy projects and identifying legal features that make these programs successful, looking to New York as a case study.

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INTRODUCTION

Climate change, once a threat for future generations, is here.¹ Human-caused climate change already affects every person on the globe through extreme weather events, drought, and changing atmospheric patterns.² To prevent some of the most extreme impacts, many countries have set a goal of limiting warming to 1.5°C above preindustrial levels.³ The most recent United Nations report estimates that only under their lowest emission scenario will we be able to limit warming to 1.5°C.⁴ While some impacts of climate change are inevitable, the Intergovernmental Panel on Climate Change (“IPCC”) predicts that we have until 2030 to limit climate change to 1.5°C.⁵ In an attempt to prevent catastrophic warming, the Biden Administration has recently announced renewed goals to reduce greenhouse gas emissions by 50% to 52% from 2005 levels by 2030.⁶

Decarbonizing the power sector is a key pillar in meeting these domestic goals and can provide a roadmap for other countries.⁷ To do so, the United States must install utility-scale renewable energy facilities at an unprecedented rate.⁸ Simply put, we need a lot of renewable energy, and we need it now. Making such a rapid transition requires massive technological mobilization and raises important questions around siting these new facilities.

A prominent challenge for the Biden Administration—and future administrations hoping to prevent catastrophic climate change—in meeting its ambitious goals is the slough of regulatory approvals needed to permit and site

1. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS 5 (Valérie Masson-Delmotte et al. eds., 2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM_final.pdf.

2. *Id.* at 8.

3. See *infra* Part I.A.

4. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 1, at 29; Umair Irfan & Rebecca Leber, *The Devastating New UN Report on Climate Change, Explained*, VOX (Aug. 9, 2021, 10:50 AM), <https://www.vox.com/22613027/un-ipcc-climate-change-report-ar6-disaster>.

5. MYLES ALLEN ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT ON GLOBAL WARMING OF 1.5°C: SUMMARY FOR POLICYMAKERS 18 (2018), https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SPM_version_report_LR.pdf; Jonathan Watts, *We Have 12 Years To Limit Climate Change Catastrophe, Warns UN*, THE GUARDIAN (Oct. 8, 2018, 2:23 AM), <https://www.theguardian.com/environment/2018/oct/08/global-warming-must-not-exceed-15c-warns-landmark-un-report>.

6. Press Release, White House Briefing Room, FACT SHEET: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies (Apr. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/> [hereinafter Biden Sets 2030 Greenhouse Reduction Target]. While this goal is ambitious, it may still fall short of keeping the world to less than 1.5°C warming. See Brad Plumer & Nadja Popovich, *The U.S. Has a New Climate Goal. How Does It Stack Up Globally?*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/04/22/climate/new-climate-pledge.html?action=click&module=Spotlight&pgtype=Homepage> (Apr. 22, 2021).

7. Michael B. Gerrard, *Legal Pathways for a Massive Increase in Utility-Scale Renewable Generation Capacity*, 47 ENV'T L. REP. 10591, 10591 (2017).

8. *Id.* In 2015, the U.S. added over 15,000 MW of onshore wind and solar PV. *Id.* This will need to increase to the annual installation of over 115,000 MW by 2050. *Id.*

renewable energy facilities.⁹ Although many communities are often enthusiastic about renewable energy projects, these projects can also provoke strong preemptive opposition.¹⁰ As a result, in most states, at least some local governments have enacted policies that restrict or prevent the development of renewable energy projects.¹¹ A recent report from the Sabin Center for Climate Change Law at Columbia Law School found over 100 such local ordinances.¹² Accordingly, achieving this scale of energy transformation requires rethinking the ways that renewable energy facilities are permitted and sited.¹³ Some states have attempted to address this renewable energy “choke point” by preempting local siting restrictions through streamlined, state-level permitting processes for new renewable facilities.¹⁴ New York, for example, enacted a number of laws—most notably article 10 and the Accelerated Renewable Energy Growth and Community Benefit Act—that allow the state to override local laws that unreasonably restrict renewable energy development.¹⁵

In the absence of a comprehensive federal regime tailored to siting new renewable energy facilities, states have an opportunity to create legislation to streamline siting for renewable energy. State policy that preempts local restrictions on renewable energy siting can facilitate a rapid decarbonization of the energy sector that aligns with national—and in some cases, state—emissions reduction targets.¹⁶ Done correctly, such policies encourage renewable energy development while maintaining environmental considerations and community input. The challenge, however, is designing an approach that promotes these seemingly disconnected goals.

This Note explains how states can use their preemptive authority to streamline the siting of renewable energy while maintaining community input and environmental protections. Part I outlines the need for renewable energy generation and the scale of the transition that is needed to meet climate goals. Part I also introduces current siting processes for renewable energy facilities and discusses the types of restrictions that local governments have enacted to restrict the siting of renewable facilities. Part II discusses New York’s policies, which use preemption to respond to local ordinances. Finally, Part III analyzes whether New York’s approach can be replicated by other states facing similar local

9. Jeffrey Tomich, *Biden Clean Energy Plan Faces Permitting ‘Choke Point,’* POLITICO PRO (June 8, 2021, 7:06 AM), https://subscriber.politicopro.com/article/eenews/1063734375?utm_campaign=edition&utm_medium=email&utm_source=eenews%3Aenergywire.

10. RADHIKA GOYAL, KATE MARSH, NEELY MCKEE & MARIS WELCH, *OPPOSITION TO RENEWABLE ENERGY FACILITIES IN THE UNITED STATES 1–2* (Jacob Elkin ed., 2022), <https://climate.law.columbia.edu/sites/default/files/content/RELDI%20report%20updated%209.10.21.pdf>.

11. *Id.* at 2.

12. *See generally id.*

13. Tomich, *supra* note 9.

14. Michael B. Gerrard & Edward McTiernan, *State Authority in NY To Preempt Local Laws Regulating Renewable Energy Projects*, LAW.COM: N.Y. L.J. (May 9, 2018, 2:45 PM), <https://www.law.com/newyorklawjournal/2018/05/09/state-authority-in-ny-to-preempt-local-laws-regulating-renewable-energy-projects/>.

15. *Id.*

16. Tomich, *supra* note 9; *see also* Gerrard, *supra* note 7, at 10607.

restrictions. Additionally, Part III discusses the successes and drawbacks of using state preemption to streamline the siting of renewable energy projects.

While this Note focuses primarily on state preemption of local laws, other approaches could be taken as well.¹⁷ Some commentators have suggested that federal policy could streamline the siting and permitting process, preempting any state or local restrictions on renewable energy and providing a more coordinated approach.¹⁸ Furthermore, while this Note focuses primarily on utility-scale wind and solar projects, offshore wind and distributed generation may also play a central role in decarbonizing the electricity sector. Finally, as restrictions on renewable energy development multiply, some landowners prevented from leasing to clean energy developers may seek to bring takings claims.¹⁹

I. BACKGROUND

A. SCALE OF RENEWABLE GENERATION

In 2015, 196 countries signed on to the Paris Agreement and agreed to the goal of limiting global temperature increases to “well below 2°C” compared to preindustrial levels and “pursu[ing] efforts to limit the temperature increase to 1.5°C” to reduce the risks posed by climate change.²⁰ Thereafter, individual signatory countries have put forth “nationally determined contributions” (“NDCs”) outlining their respective emissions reduction targets.²¹ To have a chance at meeting the 1.5°C target, CO₂ emissions must be cut dramatically by 2030.²²

17. Many of the following topics, however, are outside the scope of this Note.

18. *See, e.g.*, Gerrard, *supra* note 7, at 10608 (discussing how the Telecommunications Act of 1996 and the Energy Policy Act of 2005 could be used as models for such new federal legislation); NAT'L ASS'N OF REGUL. UTIL. COMM'R, WIND ENERGY & WIND PARK SITING AND ZONING BEST PRACTICES AND GUIDANCE FOR STATES A-27 (2012), <https://pubs.naruc.org/pub.cfm?id=539BA6EE-2354-D714-5157-359DDD67CE7F>. *See generally* Danielle Sugarman, Model Small-Scale Solar Siting Ordinance (2012) (unpublished manuscript), <https://climate.law.columbia.edu/sites/default/files/content/docs/others/Model-ordinance-Solar-v-7.pdf> (model small-scale solar siting ordinance); James M. McElfish Jr. & Sara Gersen, *Local Standards for Wind Power Siting: A Look at Model Ordinances*, 41 ENV'T L. REP. 10825 (2011). For an example of recent legislation clarifying the Federal Energy Regulatory Commission's ("FERC") scope of preemptive authority in siting transmission corridors, see Benjamin Storrow, *Power Lines Are Infrastructure Bill's Big Climate Win*, POLITICO PRO (Nov. 9, 2021, 6:31 AM), <https://subscriber.politicopro.com/article/eenews/2021/11/09/power-lines-are-infrastructure-bills-big-climate-win-282995>.

19. At the time of publication, there is no literature analyzing potential takings claims resulting from local ordinances restricting renewable energy development. There is, however, a growing body of literature analyzing the potential for takings claims in response to bans and restrictions on fracking. *See generally, e.g.*, Kevin J. Lynch, *Regulation of Fracking Is Not a Taking of Private Property*, 84 U. CIN. L. REV. 39 (2018); Kevin J. Lynch, *A Fracking Mess: Just Compensation for Regulatory Takings of Oil and Gas Property Rights*, 43 COLUM. J. ENV'T L. 335 (2018); David B. Spence, *The Political Economy of Local Vetoes*, 93 TEX. L. REV. 351 (2014).

20. *The Paris Agreement: What Is the Paris Agreement?*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> (last visited May 12, 2023).

21. *Id.*

22. ALLEN ET AL., *supra* note 5; Watts, *supra* note 5.

Although many of the NDCs were lauded as ambitious targets, collectively they represent emission reductions that are insufficient to meet the 1.5°C target.²³ Furthermore, most countries' policies are predicted to fall short of the targets set out in the NDCs.²⁴ After being absent from the Paris Agreement during the Trump Administration, the United States rejoined the Agreement in 2021 under the Biden Administration.²⁵ In rejoining, the Biden Administration also put forth a more ambitious NDC of reducing emissions by 50% to 52% from 2005 levels by 2030.²⁶ Notwithstanding these more aggressive goals, the United States' current policies and reductions are incompatible with limiting warming to 1.5°C.²⁷

Even meeting the Biden Administration's goals will require constructing a massive number of renewable energy facilities.²⁸ By some estimates, this will require installing 725 gigawatts ("GW") of onshore wind and 489 GW of solar PV by 2050.²⁹ For perspective, as of 2018, the United States had installed a *total cumulative capacity* of 96 GW and 52 GW of wind and solar, respectively.³⁰ The vast number of new facilities is needed not only to replace fossil fuel generation, but also to account for increased electricity demand as a result of electrifying sectors currently powered by fossil fuels—passenger vehicles and heating, for example.³¹

Although this goal requires significant increases in the rate of installation of renewable energy, it is achievable.³² Over the past decade, the United States has installed renewable energy facilities at an increasingly rapid pace.³³ Between 2009 and 2018, the United States almost doubled its total renewable energy

23. U.N. ENV'T PROGRAMME, EMISSIONS GAP REPORT 2021: THE HEAT IS ON 35 (2021), <https://www.unep.org/emissions-gap-report-2021>.

24. *Id.*

25. Press Statement, Antony J. Blinken, Sec'y, Dep't of State, The United States Officially Rejoins the Paris Agreement (Feb. 19, 2021), <https://www.state.gov/the-united-states-officially-rejoins-the-paris-agreement/>.

26. Biden Sets 2030 Greenhouse Reduction Target, *supra* note 6. While this goal is ambitious, it may still fall short of keeping the world to less than 1.5°C warming. See Plumer & Popovich, *supra* note 6.

27. USA, CLIMATE ACTION TRACKER, <https://climateactiontracker.org/countries/usa/targets/> (last visited May 12, 2023).

28. Gerrard, *supra* note 7, at 10591.

29. *Id.* at 10593. This estimate is based on the Deep Decarbonization Pathways Project "Mixed Scenario." See DEEP DECARBONIZATION, <http://deepdecarbonization.org/> (last visited May 12, 2023).

30. SAM KOEBRICH, THOMAS BOWEN & AUSTIN SHARPE, U.S. DEP'T OF ENERGY, OFF. OF ENERGY EFFICIENCY & RENEWABLE ENERGY, 2018 RENEWABLE ENERGY DATA BOOK 25 (2018), <https://www.nrel.gov/docs/fy20osti/75284.pdf>.

31. Gerrard, *supra* note 7, at 10592.

32. Jeff St. John, *Report Outlines How US Could Reach 50% Renewables by 2030*, GREENTECH MEDIA (Dec. 18, 2020), <https://www.greentechmedia.com/articles/read/report-charts-a-path-for-u.s.-to-reach-50-renewables-by-2030>; *US Renewable Energy Policy Scenario Analysis*, WOOD MACKENZIE (Dec. 16, 2020), <https://www.woodmac.com/our-expertise1/focus/Power—Renewables/us-renewable-energy-policy-scenario-analysis/>.

33. *Electricity Explained: Electricity Generation, Capacity, and Sales in The United States*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/energyexplained/electricity/electricity-in-the-us-generation-capacity-and-sales.php> (last visited May 12, 2023).

capacity.³⁴ Furthermore, since 2018, the rate of addition of new renewable energy has only increased. In three years, the rate of adding new wind and solar capacity has almost doubled.³⁵ In 2018 alone, the United States added 7.5 GW and 8.8 GW of wind and solar capacity, respectively.³⁶ By 2021, this annual rate had increased to 12.2 GW and 15.4 GW, respectively.³⁷

Despite these gains, the United States will have to continue to increase the rate of renewable energy additions. Although renewable capacity has been steadily increasing over the past decade, reaching emissions reduction targets by 2050 will require annual capacity additions that are many times current rates.³⁸ One estimate suggests that by 2035, the United States will need to reach *annual* capacity additions of 26.5 GW of onshore wind and 12 GW of solar PV.³⁹ A more ambitious estimate suggests that these annual additions would need to reach 61 GW and 20 GW, respectively, by the same year.⁴⁰ Of course, even if the United States does not meet these targets, tremendous investment in renewable energy is still required. Limiting warming to 2°C, rather than 3°C, for example, may avert some of the most catastrophic impacts.⁴¹ Preventing 2°C or 3°C warming will still require significant renewable energy development. Thus, the United States needs to add a massive amount of renewable energy capacity, and to do so at an unprecedented rate.

This leads us to the current dilemma: where will all these renewable energy projects go? Out of the numerous hurdles that stand in the way of renewable energy projects, siting and permitting at the state and local level could pose the most serious obstacle to the necessary rapid transition to renewable energy.⁴²

B. SITING RENEWABLE ENERGY PROJECTS: ROLE OF STATE AND LOCAL GOVERNMENTS

After identifying a site for a wind or solar facility, the project proponent must meet a number of permitting requirements. Depending on the state, permitting for onshore wind and solar projects occurs at the federal, state, and

34. KOEBRICH ET AL., *supra* note 30, at 22. Renewable energy nameplate capacity increased from 130,867 MW in 2009 to 249,396 MW in 2018. *Id.*

35. *Renewables Account for Most New U.S. Electricity Generating Capacity in 2021*, U.S. ENERGY INFO. ADMIN. (Jan. 11, 2021), <https://www.eia.gov/todayinenergy/detail.php?id=46416>.

36. KOEBRICH ET AL., *supra* note 30, at 24.

37. *Renewables Account for Most New U.S. Electricity Generating Capacity in 2021*, *supra* note 35.

38. Gerrard, *supra* note 7, at 10593.

39. *Id.* (DDPP “Mixed Scenario”).

40. *Id.* (DDPP “High Renewables Scenario”).

41. *See generally* HANS-O. PÖRTNER ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY: SUMMARY FOR POLICYMAKERS (2022), https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf.

42. Gerrard, *supra* note 7, at 10607; Tomich, *supra* note 9 (describing how the siting process for renewable projects acts as a “choke point”).

local level.⁴³ Generally, permitting for wind and solar projects takes place at the federal level if the project is located on federal land or requires some other federal action.⁴⁴

Additionally, a minority of states have created agencies, councils, or siting boards with jurisdiction over the approval of renewable energy facilities.⁴⁵ For example, Oregon and Minnesota have state siting councils with mandatory jurisdiction over renewable energy projects of a certain size.⁴⁶ Other states, like Washington, have siting councils that may take jurisdiction over any energy project at the election of the applicant.⁴⁷ In states without centralized siting authorities or for projects that fall outside the jurisdiction of such agencies, wind and solar facilities are typically permitted by local jurisdictions.⁴⁸ Local siting authority derives from the broad police power of local governments.⁴⁹

In the absence of state legislation, local zoning conditions—like those limiting renewable development—have been the purview of local governments.⁵⁰ In New York, for example, the home rule doctrine—developed over a century ago—was meant to increase the autonomy of local governments.⁵¹ The doctrine is the product of the movement for municipal self-governance that emerged in the nineteenth century.⁵² As a result, local governments “have the power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government.”⁵³ General laws are those that “in terms and in effect

43. Thomas J. Braun, Sarah Stauffer Curtiss & Timothy L. McMahan, *Siting and Permitting Wind Projects*, in *THE LAW OF WIND: A GUIDE TO BUSINESS AND LEGAL ISSUES* 1, 1 (9th ed. 2018), <https://files.steel.com/files/SR/Stoel%20Rives%20-%20The%20Law%20of%20Wind.pdf> [hereinafter Braun et al., *Siting and Permitting Wind Projects*]; Thomas J. Braun, Timothy L. McMahan & Allison C. Smith, *Permitting and Land Use*, in *THE LAW OF SOLAR: A GUIDE TO BUSINESS AND LEGAL ISSUES* 1, 1 (6th ed. 2022), <https://files.steel.com/files/SR/Stoel%20Rives%20-%20The%20Law%20of%20Solar.pdf> [hereinafter Braun et al., *Permitting and Land Use*].

44. Braun et al., *Permitting and Land Use*, *supra* note 43. A full discussion of federal permitting for renewable facilities is outside the scope of this Note.

45. Jaclyn Kahn & Laura Shields, *State Approaches to Wind Facility Siting*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/energy/state-wind-energy-siting.aspx#sitingauthority> (Sept. 2, 2020).

46. Braun et al., *Siting and Permitting Wind Projects*, *supra* note 43. In these states, public input is still available through comment periods and listening sessions. Nevertheless, decisions by siting councils are occasionally challenged in court. *See, e.g.*, *Blue Mountain All. v. Energy Facility Siting Council*, 300 P.3d 1203, 1204–05 (Or. 2013) (en banc) (upholding siting council decision to grant permits to a wind facility).

47. Braun et al., *Siting and Permitting Wind Projects*, *supra* note 43.

48. *Id.* at 2; Braun et al., *Permitting and Land Use*, *supra* note 43, at 2.

49. K.K. DuVivier, *The Superagency Solution*, 46 MCGEORGE L. REV. 189, 192 (2014). In many states, siting energy facilities has shifted toward state control. For a discussion of different approaches between states, see *id.* at 192–95.

50. Alexa L. Archambault, *Green Energy v. The Constitution: New York State's Battle with Home Rule Provisions in the Age of Environmentalism*, 69 BUFF. L. REV. 873, 884–85 (2021). Other states have variations on home rule provisions, so choosing New York here is for the purpose of demonstrating the interaction between the home rule doctrine and state preemption of the siting of renewable energy projects.

51. *Id.* at 884.

52. *Id.*

53. N.Y. CONST. art IX, § 2, cl. (c); see also Archambault, *supra* note 50, at 884.

appl[y] alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages.”⁵⁴ This municipal power generally applies to the powers and duties of officers; members and composition of its legislature; transactions of businesses; incurring of obligations; management of highways, roads, and property; transit facilities; levy and collection of local taxes; and the governance, protection, order, conduct, safety, health, and well-being of persons or property therein.⁵⁵

The home rule doctrine was intended to “[carve] out a sphere of autonomy for local governments” over certain matters by limiting the state legislature’s ability to regulate with respect to local issues.⁵⁶ New York is a useful example for the purposes of this Note, but many other states have developed similar home rule jurisprudence.⁵⁷

C. PREEMPTION AS A LIMIT ON LOCAL CONTROL

Although the home rule doctrine appears to be a broad grant of power to local governments, it is not without limits. Most notably, it is constrained by the doctrines of preemption and “State concern.”⁵⁸ In the absence of an express statement of preemption, a state can still preempt by implication. In New York, this was explained in *Albany Area Builders Ass’n v. Town of Guilderland*,⁵⁹ where the court held:

Where the State has preempted the field, a local law regulating the same subject matter is deemed inconsistent with the State’s transcendent interest, whether or not the terms of the local law actually conflict with a State-wide statute. Such local laws, were they permitted to operate [would] . . . thwart the operation of the State’s overriding policy concerns.⁶⁰

Thus, the state can preempt local laws in two ways. First, conflict preemption occurs when there is a “conflict or ‘head-on collision’ between a local law and state statute.”⁶¹ If a local law prohibits something expressly allowed by state statute, or if the local law explicitly allows something prohibited by state statute, the local law is unenforceable.⁶²

Alternatively, in the absence of an outright conflict, a local law is preempted if the state has attempted to occupy the field.⁶³ Field preemption can

54. N.Y. CONST. art IX, § 2, cl. (d)(1); see also Archambault, *supra* note 50, at 884.

55. N.Y. CONST. art IX, § 2, cl. (c)(1)–(10).

56. N.Y. STATE BAR ASS’N, REPORT AND RECOMMENDATIONS CONCERNING CONSTITUTIONAL HOME RULE 22 (2016), <https://nysba.org/app/uploads/2020/02/COSC-Report-on-Home-Rule-final-approved-by-the-House-1.pdf>.

57. See JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 4.1, Westlaw (database updated May 2022).

58. Archambault, *supra* note 50, at 885.

59. 74 N.Y.2d 372 (1989).

60. *Id.* at 377 (emphasis added) (quotations and citations omitted).

61. *Id.*; N.Y. STATE BAR ASS’N, *supra* note 56, at 16–17 (quoting *Lansdown Ent. Corp. v. N.Y.C. Dep’t of Consumer Affs.*, 74 N.Y.2d 761, 764 (1989)).

62. N.Y. STATE BAR ASS’N, *supra* note 56, at 17.

63. N.Y. STATE DIV. OF LOC. GOV’T SERVS., ADOPTING LOCAL LAWS IN NEW YORK STATE 6–7 (2023).

be either express or implied. Express field preemption invalidates a local law when a state statute expressly states that it preempts any local law on the same subject.⁶⁴ Implied field preemption occurs when “either the purpose and scope of the regulatory scheme will be so detailed or the nature of the subject of regulation will be such that the court may infer a legislative intent to preempt, even in the absence of an express statement of preemption.”⁶⁵ Courts have found that residency restrictions for sex offenders, minimum wage laws, taxes for roadway construction, operation of taverns and bars, regulations on where abortions may be performed, and power plant siting may all be preempted.⁶⁶

The state concern doctrine—like the doctrine of preemption—further limits the home rule. The doctrine stands for the proposition that state legislation on matters of state concern may render the home rule inoperative and supersede local regulations that relate to interests that would normally fall within the purview of local government.⁶⁷ Time and again, the New York Supreme Court has upheld the state legislature’s authority to enact laws in areas of state concern that also relate to local issues. That court has found a number of issues to be matters of state concern, including: waste disposal,⁶⁸ municipal sewers,⁶⁹ park resources,⁷⁰ district attorneys’ salaries,⁷¹ local taxation,⁷² zoning law exemptions

64. *Albany Area Builders Ass’n*, 74 N.Y.2d at 377.

65. N.Y. STATE BAR ASS’N, *supra* note 56, at 17–18 (quoting Laura D. Hermer, *Municipal Home Rule in New York: Tobacco Control at the Local Level*, 65 BROOK. L. REV. 321, 349 (1999)).

66. *Id.* at 18–19.

67. *See, e.g.*, *Empire State Chapter of Associated Builders & Contractors v. Smith*, 992 N.E.2d 1067, 1071 (N.Y. 2013) (“[I]f the subject be in a substantial degree a matter of State concern, the Legislature may act, though intermingled with it are concerns of the locality.” (quoting *Adler v. Deegan*, 167 N.E. 705, 714 (N.Y. 1929))); N.Y. STATE BAR ASS’N, *supra* note 56, at 23.

68. *See e.g.*, *Town of Islip v. Cuomo*, 473 N.E.2d 756, 759–61 (N.Y. 1984) (upholding state law regulating waste disposal in Nassau and Suffolk Counties).

69. *See e.g.*, *Robertson v. Zimmermann*, 196 N.E. 740, 745 (N.Y. 1935) (upholding state law regulating municipal sewers in the City of Buffalo).

70. *See e.g.*, *Wambat Realty Corp. v. State*, 362 N.E.2d 581, 584–85 (N.Y. 1977) (upholding state law regulating zoning and planning within Adirondack Park).

71. *See e.g.*, *Kelley v. McGee*, 443 N.E.2d 908, 914–15 (N.Y. 1982) (upholding state regulation of salaries of district attorneys in certain counties).

72. *See e.g.*, *N.Y. Steam Corp. v. City of New York*, 197 N.E. 172, 173 (N.Y. 1935) (upholding statute authorizing certain cities to pass local taxes for unemployment relief).

for housing projects,⁷³ rent control,⁷⁴ pension and retirement bonds,⁷⁵ taxicabs,⁷⁶ and cultural institutions.⁷⁷

Thus, the New York home rule is important to understanding its renewable energy siting laws and reflects similar dynamics between state and local laws in other states considering siting renewable energy projects at the state level.⁷⁸

D. LOCAL RESTRICTIONS AS A BARRIER TO RENEWABLE ENERGY PROJECTS

Although the prospect of increased renewable generation is frequently supported at the state level, local communities often push back.⁷⁹ In some cases, communities like the idea of renewable energy, but not-in-my-backyard (“NIMBY”) sentiments prevail, and residents oppose projects in their communities notwithstanding their general support for renewables.⁸⁰ Alternatively, communities that are “caught off guard” or surprised by proposed renewable energy projects often respond by advocating for and enacting protective measures.⁸¹ Furthermore, although renewable energy facilities do have some impacts on nearby residents, an increasing amount of opposition is based on unproven misconceptions spread over social media.⁸² Of course, there

73. See e.g., *Floyd v. N.Y. State Urb. Dev. Corp.*, 300 N.E.2d 704, 706 (N.Y. 1973) (upholding statute authorizing the New York State Urban Development Corporation to undertake development projects exempt from local restrictions).

74. See e.g., *City of New York v. State*, 323 N.Y.S.2d 460, 462 (N.Y. App. Div. 1971), *aff’d*, 291 N.E.2d 583 (N.Y. 1972) (holding that rent control was a matter of state concern).

75. See e.g., *Bugeja v. City of New York*, 266 N.Y.S.2d 80, 81 (N.Y. App. Div. 1965), *aff’d*, 215 N.E.2d 684 (N.Y. 1966) (upholding the legislature’s issuance of serial bonds to cover New York City’s retirement liabilities).

76. See e.g., *Greater N.Y. Taxi Ass’n v. State*, 993 N.E.2d 393, 401 (N.Y. 2013) (upholding state law regulating livery cabs in the outer boroughs of New York City).

77. See e.g., *Hotel Dorset Co. v. Tr. for Cultural Res.*, 385 N.E.2d 1284, 1288 (N.Y. 1978) (upholding statute that was applied only to the Museum of Modern Art).

78. See MARTINEZ, *supra* note 57, § 4.13.

79. GOYAL ET AL., *supra* note 10, at 1; see also Uma Outka, *Renewable Energy Siting for the Critical Decade*, 69 U. KAN. L. REV. 857, 861–62 (2021).

80. K.K. DuVivier & Thomas Witt, *NIMBY to NOPE—or YESS?*, 38 CARDOZO L. REV. 1453, 1462 (2017). Even in some of the most progressive states, like Vermont, residents generally support getting more renewable energy—as long as it comes from somewhere else. Jim Motavalli, *The NIMBY Threat to Renewable Energy*, SIERRA (Sept. 20, 2021), <https://www.sierraclub.org/sierra/2021-4-fall/feature/nimby-threat-renewable-energy> (“All those turbines and solar panels [required to meet U.S. climate targets] (plus the requisite transmission lines) have to go somewhere. But many communities—including those full of avowed liberals and environmentalists—are working hard to make sure they go somewhere else.”).

81. Outka, *supra* note 79, at 868.

82. See Julia Simon, *Misinformation Is Derailing Renewable Energy Projects Across the United States*, NPR (Mar. 28, 2022, 5:00 AM), <https://www.npr.org/2022/03/28/1086790531/renewable-energy-projects-wind-energy-solar-energy-climate-change-misinformation>; see also Joseph Bernstein, “*Corrosive Communities*”: *How a Facebook Fight over Wind Power Predicts the Future of Local Politics in America*, BUZZFEED NEWS (Dec. 17, 2021, 8:35 AM), <https://www.buzzfeednews.com/article/josephbernstein/facebook-groups-wind-turbine-construction>. Facebook, for example, has become a powerful catalyst for local action and is frequently based on disproven scientific and medical studies. Bernstein, *supra*. Online groups—sometimes encouraged by anti-wind organizations—are highly effective at organizing local opposition to wind projects by “building social connections among anti-wind groups around the country, and contributing to erosion of social bonds within the local communities themselves.” *Id.*

are legitimate and significant environmental impacts of renewable energy projects. Throughout the northeastern United States, for example, wind development generally occurs on ridgetops because that is where the wind is the strongest and most consistent.⁸³ This development requires clearing large areas of trees, which impacts the aesthetics of the area and can cause habitat fragmentation. Finally, environmental justice communities that are most impacted by energy infrastructure may be skeptical of new, albeit renewable, energy projects.⁸⁴

As a result, in almost every state, local governments have implemented measures that slow or prevent the development of renewable energy projects.⁸⁵ In 2021, there were at least 100 such laws enacted across the fifty states.⁸⁶ In some cases, these laws were enacted in response to a specific project.⁸⁷ In other instances, local governments enacted restrictive policies in the absence of any proposed project.⁸⁸

These laws can take many forms, ranging from outright bans to complicated zoning restrictions. In 2018, for example, Commissioners in Thomas County, Georgia, unanimously enacted a “temporary” moratorium on solar energy facility construction.⁸⁹ But two years later, the moratorium was still in place.⁹⁰ Similarly, Hardin County, Iowa enacted an indefinite moratorium on wind facility construction in 2019.⁹¹ Some measures were passed in response to specific projects. For example, Douglas County, Kansas passed a wind farm moratorium in response to a 105-megawatt (“MW”) project slated for development in 2005.⁹² Although the moratorium was technically temporary, it was extended year after year, effectively ending the proposed project.⁹³

Alternatively, other cities and counties have enacted less direct laws that effectively make renewable projects either impossible or uneconomical.⁹⁴ For example, multiple counties in Iowa enacted laws that capped the number of wind and solar projects at or close to the number of projects in existence at the time,

83. Julie Jones, *New England Interview: A Panel of Seven Offer Insight into the Evolving Drivers and Challenges Facing Wind Development in New England*, NAT'L RENEWABLE ENERGY LAB'Y (June 3, 2011), <https://www.nrel.gov/news/program/2011/1435.html> [<https://web.archive.org/web/20210321151915/https://www.nrel.gov/news/program/2011/1435.html>].

84. *See infra* Part III.D.

85. GOYAL et al., *supra* note 10, at 1.

86. *Id.* at 2. The Sabin Center for Climate Change Law at Columbia Law School compiled a report in 2021 of local laws and policies restricting renewable energy facilities. *See generally id.*

87. *Id.* at 1.

88. *Id.*

89. *Id.* at 10.

90. *Id.*

91. *Id.* at 18.

92. *Id.* at 20.

93. *Id.*; *see also Proposed Kansas Wind Projects*, KAN. WIND ENERGY INFO. NETWORK, http://www.kansasenergy.org/KS_wind_projects_case.htm#proposed (last visited May 12, 2023).

94. *See generally* GOYAL et al., *supra* note 10.

effectively banning new development.⁹⁵ Another common approach is to create setback requirements that make it effectively impossible to site projects within county limits.⁹⁶ Somerset, New York took yet another strategy by banning structures over 150 feet tall, limiting wind turbines to industrial zones, and prohibiting wind projects that sell electricity off-site.⁹⁷ Other cities and municipalities have employed tactics limiting the ability to develop renewable energy projects that include noise limits,⁹⁸ capacity limits,⁹⁹ bans on certain types of projects,¹⁰⁰ or a combination of tactics.¹⁰¹

In conclusion, local and municipal governments have found a wide range of methods for restricting renewable energy development. Because renewable energy projects impact local land use and aesthetics, local governments have an interest in imposing reasonable regulations on new projects. On the other hand, the state legislature has a sometimes conflicting interest in developing renewable energy projects to meet state targets without unreasonable delays and restrictions. Because these restrictions act as a barrier to meeting state and national renewable energy goals, it is critical to find the balance between these interests.¹⁰² One state that has attempted to do so is New York.

II. STATE PREEMPTION OF SITING RENEWABLE ENERGY PROJECTS

New York has made two notable attempts to widen the bottleneck created by siting restrictions.¹⁰³ The first attempt was through the article 10 process—originally enacted in 1972 and updated in 2011—to provide a streamlined

95. *Id.* at 18. In 2019, the Adair County Board of Supervisors capped the number of commercial wind turbines at 535. *Id.* At the time, there were 532 turbines built or under construction. *Id.* Similarly, in 2019, the Madison County Board of Supervisors approved an ordinance that limited the number of wind turbines in the county to the current number of existing turbines. *Id.*

96. For example, wind developers have indicated that a 1500-foot setback from occupied structures represents the high bound of what is feasible for designing utility-scale wind facilities. *Id.* at 1.

97. *Id.* at 41. Somerset also required the wind project to be set back one mile from existing buildings. *Id.*

98. In 2020, Burleson, Texas enacted an ordinance that set noise limits at 40 decibels (“db”) at adjacent residential property lines and 60 db at property lines in other zoning districts. *Id.* at 58.

99. In 2019, Balch Springs, Texas enacted an ordinance that prohibited utility wind facilities larger than 20 kilowatts (“KW”) within the city limits. *Id.* at 59.

100. In 2019, San Bernardino, California banned “utility oriented renewable energy” in rural parts of the county. *Id.* at 5.

101. For example, Kosciusko County, Indiana enacted a law that requires wind turbines to be set back at least 3,960 feet or 6.5 times the turbine height from adjacent property lines, limits turbine noise to 32 A-weighted decibels (“dBA”), requires that there be no shadow flicker on neighboring homes, and limits construction to industrial zones. *Id.* at 15.

102. Tomich, *supra* note 9.

103. In some states, however, state legislatures have acted to preempt local governments from enacting renewable energy goals. For example, in 2021, in response to a local ordinance banning new fossil fuel infrastructure, the Florida Legislature passed a bill that prohibits local governments from taking “any action that restricts or prohibits” where utilities get their energy from. See Emily Pontecorvo, *A Florida City Wanted To Move Away from Fossil Fuels. The State Just Made Sure It Couldn't.*, GRIST (July 29, 2021), <https://grist.org/cities/tampa-wanted-renewable-energy-resolution-florida-lawmakers-made-sure-it-couldnt-gas-ban-preemption/>.

permitting process for renewable energy developers.¹⁰⁴ More recently, in April 2020, the New York Legislature passed the Renewable Energy Growth and Community Benefit Act (“the Act”) to address some of the failures of article 10.¹⁰⁵

A. NEW YORK’S FIRST APPROACH: ARTICLE 10

In 1972, New York enacted a law to streamline the siting process for steam-electric facilities.¹⁰⁶ Over the years, the legislature modified the siting law, expanding beyond just steam-electric facilities, and it is now known as article 10, which was most recently reauthorized by the New York Power Act of 2011.¹⁰⁷ The current version of article 10 was meant to serve as a streamlined method of approving large-scale renewable energy projects and established a single decisionmaking body, the New York State Board on Electrical Generation and Siting and the Environment (“Siting Board”).¹⁰⁸

Article 10 gives the Siting Board jurisdiction over renewable energy projects of 25 MW and greater.¹⁰⁹ The Siting Board is granted the final authority to approve construction and operation of these large renewable energy projects.¹¹⁰ Moreover, the Siting Board has the authority to waive local laws that it finds are “unreasonably burdensome” on the project.¹¹¹ Article 10 creates a process by which project applicants can submit proposals to the Siting Board, which, if approved, can proceed without being subject to the State Environmental Quality Review Act (“SEQRA”).¹¹² It was originally estimated that completing the article 10 process would take approximately one to two years.¹¹³

104. 2020 N.Y. Sess. Laws ch. 58, pt. JJJ (McKinney); *see also* Michael B. Gerrard & Edward McTiernan, *New York’s New Statute on Siting Renewable Energy Facilities*, 263 N.Y. L.J., no. 93, 2020, at 1.

105. *Id.*

106. *Id.*

107. CULLEN HOWE, N.Y. LEAGUE OF CONSERVATION VOTERS EDUC. FUND, *BREAKING DOWN THE BARRIERS TO SITING RENEWABLE ENERGY IN NEW YORK STATE* 6 (2019), <https://nylcvef.org/wp-content/uploads/2019/02/renewable-siting-whitepaper.pdf>; N.Y. PUB. SERV. LAW §§ 160–173 (McKinney 2023).

108. HOWE, *supra* note 107.

109. *Id.* 25 MW is typically considered the minimum size for utility-scale renewable projects. By some estimates, a 25 MW solar facility would require between 50 and 300 acres of land and would provide enough energy to power approximately 400 homes. *See New Jersey Landfill To House 25 MW Solar Power*, SMART ENERGY DECISIONS (Aug. 17, 2021), <https://www.smartenergydecisions.com/renewable-energy/2021/08/17/new-jersey-landfill-to-house-25-mw-solar-project>. *See generally* Sean Ong, Clinton Campbell, Paul Denholm, Robert Margolis & Garvin Heath, *Land-Use Requirements for Solar Power Plants in the United States*, NAT’L RENEWABLE ENERGY LAB’Y (June 2013). A similarly sized wind facility would require approximately 1,250 acres. *See generally* Paul Denholm, Maureen Hand, Maddalena Jackson & Sean Ong, *Land-Use Requirements of Modern Wind Power Plants in the United States*, NAT’L RENEWABLE ENERGY LAB’Y (Aug. 2009).

110. HOWE, *supra* note 107, at 7.

111. *Id.*

112. *Id.*

113. *Id.*; *see also* Gerrard & McTiernan, *supra* note 104.

Despite the intentions behind article 10, its failure to fulfill its potential has manifested in two ways.¹¹⁴ First, the theoretical twelve-month timeline proved to be a gross underestimate.¹¹⁵ As of 2018, only one renewable project had received full certification, while most pending proposals were months or years behind their estimated timelines.¹¹⁶ Moreover, as of 2020, no renewable projects approved under article 10 were operational.¹¹⁷ Second, although article 10 allows the Siting Board to waive local laws that are “unreasonably burdensome,” the Siting Board was extremely hesitant to exercise this authority.¹¹⁸ This is likely because not only did article 10 fail to define “unreasonably burdensome,” but also because courts have yet to construe the meaning of “unreasonably burdensome,” leaving some uncertainty for the Siting Board to know when the standard has been met.¹¹⁹

Thus, the article 10 process was largely considered unsuccessful because it failed to actually speed up the siting process for renewable energy facilities or lead to more project approvals.¹²⁰ Although the intention was to create relatively modest upfront requirements with a centralized decisionmaking process, the article 10 process has not achieved those results, and the upfront work was ultimately more burdensome than anticipated.¹²¹ As a result, in 2020, New York decided to try a new approach and adopted the Accelerated Renewable Energy Growth and Community Benefit Act.

B. ACCELERATED RENEWABLE ENERGY GROWTH AND COMMUNITY BENEFIT ACT

In 2019, New York passed ambitious new climate change legislation. The Climate Leadership and Community Protection Act (“CLCPA”) requires 70% renewable energy generation by 2030 and all electricity to be zero emissions by 2040.¹²² To address the shortcomings of the article 10 program and help meet its new climate goals, the New York Legislature passed the Accelerated Renewable

114. Gerrard & McTiernan, *supra* note 104 (describing article 10 as a “miserable failure”).

115. *Id.*

116. HOWE, *supra* note 107, at 8; *see also* Gerrard & McTiernan, *supra* note 104.

117. Gerrard & McTiernan, *supra* note 104.

118. *See* High River Energy Ctr., No. 17-F-0597, 2021 WL 977283, at *1 (N.Y. State Bd. on Elec. Generation Siting & the Env’t Mar. 11, 2021) (approving application for a solar facility and preempting local law); *see also* HOWE, *supra* note 107, at 8; Gerrard & McTiernan, *supra* note 104 (explaining how the Siting Board has been hesitant out of fear of public backlash).

119. Michael B. Gerrard & Edward McTiernan, *State Authority To Preempt Local Laws Regulating Renewable Energy Projects*, 259 N.Y. L.J., no. 90, 2018, at 1. Despite the lack of judicial guidance on the meaning of “unreasonably restrictive,” the New York Supreme Court has upheld the language as used to override local siting requirements. *Id.* at 3. *See generally, e.g.*, Skyview Acres Coop., Inc. v. Pub. Serv. Comm’n, 558 N.Y.S.2d 972 (N.Y. App. Div. 1990); Delaney v. Pub. Serv. Comm’n, 507 N.Y.S.2d 471 (N.Y. App. Div. 1986).

120. Gerrard & McTiernan, *supra* note 104.

121. *Id.*; *see also* HOWE, *supra* note 107, at 6.

122. N.Y. EXEC. LAW § 94-c(2)(b) (McKinney 2023); Climate Leadership and Community Protection Act, 2019 N.Y. Sess. Laws, ch. 106, § 4 (effective Jan. 1, 2020); *see also* Outka, *supra* note 79, at 864.

Energy Growth and Community Benefit Act to revamp the application process for large-scale renewable energy projects.¹²³

The purpose of the Act is

to consolidate the environmental review and permitting of major renewable energy facilities in this state and to provide a single forum in which the office of renewable energy siting created by this section may undertake a coordinated and timely review of proposed major renewable energy facilities to meet the state's renewable energy goals while ensuring the protection of the environment and consideration of all pertinent social, economic and environmental factors in the decision to permit such facilities as more specifically provided in this section.¹²⁴

The Act drew on some of the successes of article 10 but made significant changes to bolster some of the weaknesses that plagued the previous program.

1. *Centralized Decisionmaking*

Like article 10, the Act created a centralized siting office—the Office of Renewable Energy Siting (“ORES”)—which was charged with collecting, evaluating, and approving siting permits.¹²⁵ When the Act was passed in 2020, ORES was given one year to establish—and has since promulgated—a set of uniform regulations to be used to guide its operation.¹²⁶ After an application is deemed complete, ORES staff prepare either a draft permit or “Statement of Intent to Deny.”¹²⁷ Following a public comment period, all parties have the opportunity to present potential issues to the assigned administrative law judge (“ALJ”).¹²⁸ These issues may include disputes between ORES staff and applicants, public comments, and matters cited by ORES staff as reasons to deny the siting permit.¹²⁹ All issues presented are settled by the ALJ, and parties may appeal to the Executive Director of ORES.¹³⁰ Following the adjudicatory hearing, the ALJ and ORES staff separately issue a recommended decision and summary of comments to the Executive Director.¹³¹ If the ALJ determines that there are no judicable issues, no adjudicatory hearing is held, and ORES staff send the Executive Director a summary of comments received during public

123. Section 94-c was part of Part JJJ of the 2020 to 2021 NYS Budget. Accelerated Renewable Energy Growth and Community Benefit Act, 2020 N.Y. Sess. Laws, ch. 58, Part JJJ, §§ 14, 102–03 (McKinney); see also Gerrard & McTiernan, *supra* note 104.

124. EXEC. LAW § 94-c(1) (emphasis added).

125. *Id.* § 94-c(3)(a).

126. *Id.* § 94-c(3)(b)–(g); see also N.Y. COMP. CODES R. & REGS. tit. 19, ch. XVIII, § 900-1.1(a) (2023).

127. COMP. CODES R. & REGS. § 900-8.1(b).

128. See *id.* § 900-8.3(a). The ALJ is designated by the Executive Director and may be recused on the basis of personal bias or for good cause. *Id.* § 900-8.7(b)(2)–(3).

129. See *id.* § 900-8.3(e)(1).

130. *Id.* § 900-8.7(b), (d).

131. *Id.* § 900-8.12(a).

comment.¹³² The Executive Director must then issue a final decision within thirty days.¹³³

Similar to article 10, “major renewable energy facilities” of 25 MW or greater must apply for permits under the Act.¹³⁴ Slightly smaller facilities—between 20 MW and 25 MW—may choose to opt in to streamline permitting.¹³⁵ Projects that have already applied for permits under article 10 may choose to transfer their applications to the Act as well.¹³⁶

Under the Act, ORES retains the centralized decisionmaking power that was granted to the Siting Board under article 10.¹³⁷ Applications for major renewable energy facilities must be submitted to ORES, and no other agency may require the project to have its approval.¹³⁸ There are small exemptions to this for projects that seek permits pursuant to federally delegated or approved programs.¹³⁹

2. *Environmental Review*

Projects that proceed pursuant to the Act are also exempt from SEQRA.¹⁴⁰ Although the Act speeds up the approval process and eliminates review under SEQRA, the Act still requires consideration and mitigation of environmental impacts from proposed projects. The Act sets out uniform conditions that apply to the environmental review of all renewable projects, while also requiring applicants to identify any impacts not addressed by the uniform conditions.¹⁴¹ Accordingly, the permit application requires an analysis of impacts on water supplies, threatened and endangered species, wetlands, waterbodies, streams, state-protected waters, agricultural resources, hazardous materials, and cultural resources and sites.¹⁴²

3. *Time Limits on the Application Process*

The Act also establishes more stringent timing requirements than those under article 10, which led to the bottleneck of project proposals.¹⁴³ First, the

132. *Id.* § 900-8.3(c)(5).

133. *Id.* § 900-8.12(c).

134. N.Y. EXEC. LAW § 94-c(2)(h) (McKinney 2023).

135. *Id.* § 94-c(4)(g).

136. *Id.* § 94-c(4)(f)(ii). In fact, the two projects that have already been approved by ORES were facilities that had previously applied under article 10 and opted to transfer their applications to ORES. *Office of Renewable Energy Siting, Permit Applications*, N.Y. STATE, <https://ores.ny.gov/permit-applications> (last visited May 12, 2023).

137. Gerrard & McTiernan, *supra* note 104.

138. EXEC. LAW § 94-c(6)(a).

139. *Id.*

140. In 2021, the New York Legislature amended the Environmental Conservation Law to expressly exclude projects undergoing permit applications pursuant to the Act. N.Y. ENV'T CONSERVATION LAW § 8-0111 (McKinney 2023).

141. EXEC. LAW § 94-c(3)(c)–(d).

142. N.Y. COMP. CODES R. & REGS. § 900-6.4(n) (2023).

143. Gerrard & McTiernan, *supra* note 104.

Act requires that ORES determine the completeness of an application within sixty days of receiving it, unless the applicant has agreed to an extension.¹⁴⁴ If ORES fails to make a determination within this time period, the application is deemed complete and may proceed.¹⁴⁵ Second, within sixty days after the application is deemed complete, ORES must publish draft permit conditions for public comment.¹⁴⁶ Following the release of the draft conditions, there shall be a public comment period of at least sixty days.¹⁴⁷ If the comments raise any “substantive and significant issue,” ORES will “promptly” set hearing date to consider any issues raised.¹⁴⁸ Finally, ORES must make a final decision on a siting permit within one year—or six months for projects proposed on brownfields, landfills, former commercial or industrial sites, or otherwise underutilized sites—from the date that the application was deemed complete.¹⁴⁹ If ORES fails to timely make this determination—unless ORES and the applicant have agreed to an extension—the siting permit is deemed automatically granted.¹⁵⁰ Taken together, these provisions seek to eliminate the time-consuming application and review process under article 10 by setting clear, enforceable timelines for the application process.

4. *Community Input and Environmental Justice*

New York also strengthened the environmental justice components of the Act by including an environmental justice exhibit.¹⁵¹ The Act requires project proponents to prepare an Environmental Justice Exhibit that identifies and evaluates “significant and adverse disproportionate environmental impacts of the facility on an Environmental Justice (EJ) area, if any, resulting from its construction and operation” of the facility.¹⁵² Furthermore, the proponent must identify any potential mitigation measure that could be taken to reduce impacts along with justifications for why such measures were not taken.¹⁵³ Finally, “[t]he applicant shall articulate the reasons why the proposed measures . . . will, to the maximum extent practicable, avoid, minimize or offset any identified significant

144. EXEC. LAW § 94-c(5)(b).

145. *Id.*

146. *Id.* § 94-c(5)(c)(i).

147. *Id.*

148. *Id.* § 94-c(5)(d).

149. *Id.* § 94-c(5)(f). This incentive for repurposing land may have the unintended consequence of “bringing facilities closer to more populated areas, raising equity considerations in some instances and increasing the likelihood of local opposition, depending on the size of the project proposed.” Outka, *supra* note 79, at 867. Given that historically these now contaminated sites were predominantly sited in low-income communities and communities of color, this incentive could lead to an increased share of renewable projects being sited in these same communities.

150. EXEC. LAW § 94-c(5)(f).

151. See N.Y. COMP. CODES R. & REGS. § 900-2.20 (2023).

152. *Id.* § 900-2.20(a). Environmental justice communities are defined as “minority or low-income communit[ies] that may bear a disproportionate share of the negative environmental consequences resulting from the siting of a major renewable energy facility.” *Id.* § 900-1.2(u).

153. *Id.* § 900-2.20(b).

and adverse disproportionate impacts, including a description of the manner in which such measures can be verified.”¹⁵⁴

The Act also requires that siting permits include a host community benefit, which is determined by the public service commission or by agreement between the applicant and the host community.¹⁵⁵ Some examples of host benefits include payments in lieu of taxes (“PILOTs”) or other payments agreed to by the host community.¹⁵⁶

Additionally, the Act creates an intervenor fund that provides support for public participation.¹⁵⁷ For each megawatt of capacity proposed, the project applicant must pay a fee of \$1,000 to a local agency account for the benefit of local agencies and community intervenors.¹⁵⁸ These funds may then be requested by community intervenors—individuals and nonprofit organizations near the proposed facility—to help facilitate participation in comment periods and hearings.¹⁵⁹

Finally, the Act requires applicants to provide multiple opportunities for community input. In addition to the public comment periods during the application process, applicants must also, at least sixty days prior to filing an application, provide notice to impacted communities and host at least one meeting for community members.¹⁶⁰

5. *Preemption of Local Regulations*

Most relevant to this Note, the Act allows the state to preempt local control in siting renewable projects. First, the Act restricts the power of local governments or municipalities to set forth requirements for siting renewable facilities.¹⁶¹ The “scope of section” provision states:

Notwithstanding any other provision of law . . . no other state agency, department or authority, or any municipality or political subdivision or any agency thereof may, except as expressly authorized under this section or the rules and regulations promulgated under this section, require any approval, consent, permit, certificate, contract, agreement, or other condition for the development, design, construction, operation, or decommissioning of a major renewable energy facility with respect to which an application for a siting permit has been filed.¹⁶²

154. *Id.* § 900-2.20(d).

155. EXEC. LAW § 94-c(5)(f).

156. COMP. CODES R. & REGS. § 900-6.1(f); Outka, *supra* note 79, at 867.

157. Outka, *supra* note 79, at 867; EXEC. LAW § 94-c(7)(a).

158. EXEC. LAW § 94-c(7)(a).

159. COMP. CODES R. & REGS. §§ 900-1.2(ab), (bh), 900-5.1(b).

160. *Id.* § 900-1.3(b).

161. EXEC. LAW § 94-c(6)(a).

162. *Id.* (emphasis added).

In this regard, the Act prevents local governments from enacting additional application requirements for renewable energy projects. This provision almost exclusively vests the decisionmaking power in ORES.¹⁶³

Second, the Act allows ORES to waive local laws that unduly burden the proposed project.¹⁶⁴ Specifically, although ORES must ensure that a project complies with applicable laws and regulations, it may

elect not to apply, in whole or in part, any local law or ordinance . . . if it makes a finding that, as applied to the proposed major renewable energy facility, it is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility.¹⁶⁵

6. “Unreasonably Burdensome” Standard

Much like article 10, the “unreasonably burdensome” standard under the Act provides little guidance. This language is similar to the standard set out under article 10 but adds the provision construing “unreasonably burdensome” in view of the CLCPA targets.

The only other guidance provided by ORES is found in the requirements of what an applicant must show to waive a local law. To receive this waiver, the applicant has the burden of identifying local laws that it would seek to have waived.¹⁶⁶ As part of the community outreach requirements, the applicant must both identify the provisions that would be “unreasonably burdensome” and provide an explanation of all the efforts the applicant has taken to comply with such local laws through design or other changes to the proposed facility.¹⁶⁷ The applicant’s justification must show (1) the degree of burden, (2) why the burden should not be borne by the applicant, (3) that the request cannot be obviated by reasonable design changes, (4) that the request is the minimum necessary, and (5) that adverse impacts of granting the request will be mitigated to the maximum extent practicable.¹⁶⁸

While further explanation of the “unreasonably burdensome” standard has not been provided by the courts, some of the current applications with ORES lend insight into the types of local laws that may be waived.¹⁶⁹ For example, the Heritage Wind Farm is a proposed wind project in Orleans County, New York that had originally applied for permits under article 10 but subsequently transferred its application to proceed under the Act.¹⁷⁰ Heritage Wind filed an

163. Archambault, *supra* note 50, at 883.

164. EXEC. LAW § 94-c(5)(e).

165. *Id.*

166. N.Y. COMP. CODES R. & REGS. § 900-1.3(a)(4) (2023).

167. *Id.* § 900-1.3(a)(4)–(5).

168. *Id.* § 900-2.25(c).

169. A number of local governments and organizations have also challenged New York’s authority to delegate the ability to waive local laws to ORES. *See* Complaint at 33–34, *Town of Copake v. N.Y. State Off. of Renewable Energy Siting*, No. 905502-21 (N.Y. Sup. Ct., June 29, 2021).

170. *Section 94-C Transfer Application*, HERITAGE WIND PROJECT, https://www.heritagewindpower.com/transfer_application (last visited May 12, 2023).

application for a 184.8 MW facility that would consist of thirty-three wind turbines in the Town of Barre, New York.¹⁷¹

As part of the original application, Heritage Wind requested that several local laws not be applied to the facility pursuant to article 10.¹⁷² One requirement was a town code that required wind turbine noise to be limited to forty-five A-weighted decibels at 1,000 feet from the turbine's base.¹⁷³ Heritage Wind argued that this requirement was unreasonably burdensome because it would be impossible to comply with "since no available commercial turbine model meets this standard."¹⁷⁴ ORES granted this waiver.¹⁷⁵ Additionally, Heritage Wind sought a waiver from another town code that required wind facilities be designed to limit shadow flicker on any roadway or residential structure to twenty-five hours per year. Heritage Wind argued—and ORES agreed—that because the state had recently adopted a thirty-hour limit, the Barre Town Code setting a more stringent standard should not be applied.¹⁷⁶

C. STATE AUTHORITY TO PREEMPT LOCAL REGULATIONS

Using preemption to waive local restrictions on renewable energy requires balancing local control over building and neighborhoods against the state's interest in deploying renewable energy to meet state targets. As a result, there have been a number of challenges to the New York State Legislature's authority to preempt local laws related to renewable energy siting.¹⁷⁷

In New York at least, the New York Court of Appeals has repeatedly upheld this authority.¹⁷⁸ In 1972, the New York Legislature enacted the predecessor to article 10—article VIII of the Public Service Law¹⁷⁹—that

171. *Id.*

172. Exhibit 31: Local Laws and Ordinances at 6, Heritage Wind, LLC, No. 16-F-0546, 2020 WL 1904731 (N.Y. State Bd. on Elec. Generation Siting & the Env't Apr. 14, 2020). The application for local law waivers was made pursuant to article 10 requirements because the application was originally filed under article 10 but was later transferred. *See Section 94-C Transfer Application, supra* note 170. Responding to a challenge, ORES determined that "[t]he circumstance that applicant's transfer application is based on materials originally developed to comply with PSL Article 10 requirements does not render it per se insufficient to demonstrate compliance with the Executive Law §94-c standard." Heritage Wind, LLC, No. 21-00026 (N.Y. Off. of Renewable Energy Siting Sept. 27, 2021) (interim decision) [hereinafter Heritage Wind Interim Decision]. ORES determined that the applicant had met the requirements of the Act and that ORES had provided justification for its waiver determinations. *Id.*

173. Barre Town Code § 350-103(B)(1); Heritage Wind Interim Decision, *supra* note 172, at 7.

174. Heritage Wind Interim Decision, *supra* note 172, at 7.

175. Heritage Wind, LLC, No. 21-00026 (N.Y. Off. of Renewable Energy Siting Mar. 15, 2021) (draft permit) [hereinafter Heritage Wind Draft Permit].

176. Heritage Wind Interim Decision, *supra* note 172, at 7; *see also* Heritage Wind Draft Permit, *supra* note 175, at 4.

177. *See, e.g.,* *Consol. Edison Co. of N.Y., Inc. v. Town of Red Hook*, 456 N.E.2d 487, 488 (N.Y. 1983); *Broome Cnty. Concerned Residents v. N.Y. State Bd. on Elec. Generation Siting & the Env't*, 157 N.Y.S.3d 166, 179 (N.Y. App. Div. 2021).

178. *See, e.g., Consol. Edison Co. of N.Y., Inc.*, 456 N.E.2d at 488.

179. 1972 N.Y. Laws ch. 385, § 2 (codified as amended at N.Y. PUB. SERV. LAW §§ 140–149a (McKinney 2023)).

created a centralized permitting board for the siting of steam power plants.¹⁸⁰ article VIII—like article 10 and the Act—contained a provision that allowed the siting board to waive local laws that were “unreasonably restrictive.”¹⁸¹

In *Consolidated Edison Co. of New York, Inc. v. Town of Red Hook*,¹⁸² the court upheld the state’s authority to preempt local laws and emphasized the importance of striking a balance between state and local control: the “purpose [of article VIII] was to have the Siting Board balance all interests, including local interests.”¹⁸³ The court then held that local laws imposing additional restrictions on steam power plants were both preempted by, and inconsistent with, article VIII.¹⁸⁴

Following this decision, New York courts have time and again reaffirmed the legislature’s authority to preempt local laws in siting energy projects under article 10,¹⁸⁵ and, more recently, the Act.¹⁸⁶ In 2019, in response to a wind project approved under article 10 in Broome County, New York, a local group organized to pass a moratorium on the construction of wind projects in the Town of Sanford.¹⁸⁷ Because the moratorium was enacted after the record had closed for ORES’s consideration of the project, it did not consider the law.¹⁸⁸ The local organization sued, but the New York Supreme Court upheld ORES’s decision, reasoning that “‘the history and scope of article [10], as well as its comprehensive regulatory scheme, . . . would be frustrated by’ last minute laws such as Local Law No. 4.”¹⁸⁹

More recently, the New York Supreme Court explicitly upheld the preemptive authority of the legislature in the Act.¹⁹⁰ After ORES promulgated rules and regulations for the Act on March 3, 2021, the Town of Copake challenged the rules.¹⁹¹ Copake was opposed to the development of a solar

180. See *Consol. Edison Co. of N.Y., Inc.*, 456 N.E.2d at 488.

181. *Id.* at 490.

182. *Id.*

183. *Id.*

184. *Id.* at 490–92.

185. See, e.g., *Broome Cnty. Concerned Residents v. N.Y. State Bd. on Elec. Generation Siting & the Env’t*, 157 N.Y.S.3d 166, 171–72 (N.Y. App. Div. 2021).

186. See generally *Town of Copake v. N.Y. State Off. of Renewable Energy Siting*, No. 905502-21 (N.Y. App. Div. Oct. 7, 2021) (citing N.Y. EXEC. LAW § 94-c (McKinney 2023)).

187. Archambault, *supra* note 50, at 897; see also Press Release, N.Y. State Bd. on Elec. Generation Siting & the Env’t, Siting Board Approves Broome County Wind Farm (Dec. 16, 2019), <https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={A5CEF520-7341-4BCC-AB39-22257C0022C8}>.

188. Archambault, *supra* note 50, at 897; see *Siting Board Approves Broome County Wind Farm*, *supra* note 187.

189. *Broome Cnty. Concerned Residents*, 157 N.Y.S.3d at 173 (quoting *Consolidated Edison Co. of N.Y., Inc.*, 456 N.E.2d at 490).

190. See generally *Town of Copake*, No. 905502-21 (N.Y. App. Div. Oct. 7, 2021) (citing N.Y. EXEC. LAW § 94-c (McKinney 2023)).

191. See generally *Town of Copake*, No. 905502-21 (N.Y. App. Div. Sept. 21, 2021) (order denying preliminary injunction).

project within its borders that would have violated its solar energy zoning laws restricting the conversion of farmland to solar energy facilities.¹⁹²

In declining to grant a preliminary injunction, the court noted the importance of home rule in local government but nevertheless held that “[t]he preemption doctrine represents a fundamental limitation on home rule powers.”¹⁹³ In response to concerns that ORES was using its power to completely ignore local interests, the court emphasized the limitations in the Act itself:

If the office determines compliance with a particular provision of a local law or ordinance to be unreasonably burdensome, it may elect not to apply it. This requirement has its genesis in the statute and is *required to balance local needs with State policy* that new major renewable energy generation projects be sited in a timely and cost-effective manner that includes consideration of local laws concerning zoning, the environment or public health and safety, and avoids or minimizes, the maximum extent practicable, adverse environmental impacts.¹⁹⁴

In affirming this authority, the Court emphasized the importance of balancing local autonomy with state interests, noting that “while preemption stands, it is wholly mindful of local interests.”¹⁹⁵ In its final decision, the Court affirmed ORES’s authority to grant waivers to projects because the authority to issue a waiver is a general law applicable to all municipalities even though the “implementation of the authority”—assessing individual waiver applications—is made on a case-by-case basis.¹⁹⁶

This series of cases demonstrates the importance of harmonizing municipal self-governance and state interests. Some commentators have noted that constitutional home rule provisions “evinced a clear intent to protect local autonomy” and that in New York, “the balance between State and local powers has tipped ‘away from the preservation of local authority towards a presumption of state concern.’”¹⁹⁷ Nevertheless, ORES maintains its authority.

III. PROPOSED FRAMEWORK: ARTICLE 10 AS A MODEL

In the face of local restrictions on renewable energy projects, states may find preemption to be a powerful tool. The New York experience illustrates that although using state preemption can be effective in speeding the transition to renewable energy, the devil is in the details. On paper, article 10 seemed to possess many of the characteristics that would lead to a theoretically successful

192. *Id.* slip op. at 3.

193. *Id.* slip op. at 23.

194. *Id.* slip op. at 24.

195. *Id.*

196. See *Town of Copake*, No. 905502-21, slip op. at 13–14 (N.Y. App. Div. Oct. 7, 2021).

197. N.Y. STATE BAR ASS’N, *supra* note 56, at 31 (quoting James D. Cole, *Constitutional Home Rule in New York: “The Ghost of Home Rule,”* 59 ST. JOHN’S L. REV. 713, 715 (1985)).

program. While the Act may still be too young to determine its success, it nonetheless provides guidance for the design of similar programs in other states.

In the absence of federal law directing the siting of renewable energy projects, states may continue to use their authority to direct the rapid deployment of renewables. While centralizing decisionmaking and using state preemption can be effective, it must be done carefully. The following discussion covers some considerations for designing a successful policy that uses state preemption to speed the deployment of renewable energy projects.¹⁹⁸

A. CENTRALIZED DECISIONMAKING

A centralized siting process can be extremely effective at speeding the permitting process for new renewable facilities.¹⁹⁹ New York's new law takes revised approaches in design to mitigate some of the shortcomings of article 10. First, the Act retains the centralized decisionmaking process that was central to article 10 by creating ORES within the State Department.²⁰⁰ Although article 10 had many flaws, centralized decisionmaking was not one of them.

Centralized decisionmaking is advantageous for developers of renewable projects because it provides "one-stop shopping" for applicants.²⁰¹ A "one-stop" process is advantageous because (1) it provides a detailed "cookie cutter" application process, (2) it provides cost savings by avoiding duplicative application and permitting processes, (3) it provides more objective review for projects that frequently cross jurisdictional boundaries, (4) a statewide agency has greater expertise with energy projects and thus can prevent a race-to-the-bottom among local governments, and (5) a statewide agency has exclusive jurisdiction and therefore preemptive power.²⁰²

Although centralized decisionmaking facilitates timely approval of renewable projects, the lack of community input and authority undercuts other goals. Most decisions made by the siting board are made either by the Executive Director or appointed staff.²⁰³ Under article 10, on the other hand, application decisions were made by the Siting Board, which contained five permanent members along with two ad hoc members from the affected community.²⁰⁴

198. Several of the key changes and important characteristics are discussed in Outka, *supra* note 79. At the time of publication, however, the implementing regulations for section 94(c) had not yet been promulgated, and that discussion is revisited here. Outka, *supra* note 79.

199. DuVivier, *supra* note 49, at 200.

200. N.Y. EXEC. LAW § 94-c(3)(a) (McKinney 2023).

201. DuVivier, *supra* note 49, at 202–03.

202. *Id.* (discussing the role of the California Energy Commission in siting renewable energy projects).

203. *See supra* Part II.B.1.

204. N.Y. PUB. SERV. LAW § 160(4) (McKinney 2023) ("Board" means the New York state board on electric generation siting and the environment, which shall be in the department and consist of seven persons: *the chair of the department*, who shall serve as chair of the board; *the commissioner of environmental conservation*; *the commissioner of health*; *the chair of the New York state energy research and development authority*; *the commissioner of economic development* and *two ad hoc public members, both of whom shall reside*

B. ENVIRONMENTAL REVIEW

While streamlining the permitting process for renewable energy facilities may help meet renewable energy goals, bypassing existing environmental protections may lead to unintended environmental impacts. Many states that have recognized the importance of analyzing the environmental impacts of projects have enacted state versions of the National Environmental Policy Act (“NEPA”).²⁰⁵

The amount of land required to decarbonize the electricity sector is staggering. Despite having fewer direct environmental impacts, renewable energy projects tend to require much more land than equivalently sized fossil fuel facilities.²⁰⁶ Because of this, along with the scale of renewable energy development likely to occur in the coming years, it is imperative to maintain some level of environmental protection in the siting process.

This can be achieved by requiring additional disclosure of environmental impacts during the application process. In New York, for example, the Act requires analysis of impacts on endangered species, wetlands, water quality, environmental justice, and other environmental factors.²⁰⁷ Projects that go through the Act, therefore, must still analyze environmental impacts of proposed projects but do not have to go through a separate SEQRA permitting process.²⁰⁸ Another option, which California is pursuing with housing development, is to streamline review procedures for projects that meet substantive baseline requirements.²⁰⁹

C. TIME LIMITS ON THE APPLICATION PROCESS

Setting clear deadlines throughout the application process both provides predictability for project proponents and prevents projects from facing multiyear delays throughout the process. Other states seeking to create centralized siting boards should similarly adopt strict deadlines, or risk the unreasonably long application process that plagued article 10.

within the municipality in which the facility is proposed to be located, except if such facility is proposed to be located within the city of New York, then all ad hoc members shall reside within the community district in which the facility is proposed to be located. One ad hoc member shall be appointed by the president pro tem of the senate and one ad hoc member shall be appointed by the speaker of the assembly, in accordance with subdivision two of section one hundred sixty-one of this article. The term of the ad hoc public members shall continue until a final determination is made in the particular proceeding for which they were appointed.” (emphasis added).

205. *See States and Local Jurisdictions with NEPA-Like Environmental Planning Requirements*, NEPA.GOV, <https://ceq.doe.gov/laws-regulations/states.html> (last visited May 12, 2023).

206. SAMANTHA GROSS, BROOKINGS INST., *RENEWABLES, LAND USE, AND LOCAL OPPOSITION IN THE UNITED STATES 2* (2020), https://www.brookings.edu/wp-content/uploads/2020/01/FP_20200113_renewables_land_use_local_opposition_gross.pdf.

207. *See generally* N.Y. COMP. CODES R. & REGS. tit. 19, ch. XVIII, § 900 (2023).

208. N.Y. ENV'T CONSERV. LAW § 8-0111 (McKinney 2023).

209. *See, e.g.*, CAL. GOV. CODE § 65913.4 (West 2023).

One of the pitfalls of article 10 was that many projects got stuck in the application process for years, eventually making them unviable.²¹⁰ The Act remedies this by setting deadlines along the application process that default toward approval if ORES fails to meet them. Because the Act is still in its infancy, it remains to be seen whether the approach will be successful. However, it seems that setting strict deadlines that default toward approval if not met may provide a meaningful remedy to the bureaucratic delays that plagued article 10.

D. ENVIRONMENTAL JUSTICE

The relationship between local governments and a state siting board rides a fine line. Granting too much authority to a board without community input risks silencing and jeopardizing communities. On the other hand, leaving final decisionmaking up to local governments provides an opportunity for overemphasis on local concerns and may result in the types of restrictions discussed in Part I.²¹¹ The Act attempts to strike a balance between retaining local input and preventing local governments from unreasonably preventing the development of renewable energy facilities.

But might there be times when community opposition should be allowed to stand in the way of a project? Decades of environmental racism, such as siting polluting industry and hazardous waste sites in predominantly low-income communities and communities of color, have left these communities to bear the highest burden of environmental degradation.²¹² Furthermore, not only has environmental racism led to disproportionate impacts on communities of color, but people of color have also been systematically excluded from environmental decisionmaking affecting their communities.²¹³

As a result, when using state preemption to streamline siting renewable energy projects and bypass community control, it is important to consider environmental justice impacts. Environmental justice related to energy projects typically conjures images of fossil fuel production and refining, which pose significant local threats. Renewable energy facilities, for the most part, are not polluting facilities and raise far fewer environmental justice concerns.²¹⁴ In fact, they can offer substantial community benefits in the form of revenues from renewable energy facilities, service reliability, and lower energy bills.²¹⁵ Wind and solar projects nevertheless come with some negative impacts, including on

210. Gerrard & McTiernan, *supra* note 104.

211. See DuVivier, *supra* note 49, at 203.

212. Clifford J. Villa, *Remaking Environmental Justice*, 66 LOY. L. REV. 469, 486 (2020).

213. *Id.* at 486–87.

214. See *Greenhouse Gas Emissions from Energy Data Explorer*, IEA, <https://www.iea.org/data-and-statistics/data-tools/greenhouse-gas-emissions-from-energy-data-explorer> (Nov. 10, 2021).

215. See *LA Is Prioritizing Environmental Justice on Path to 100% Renewables*, NAT'L RENEWABLE ENERGY LAB'Y (Apr. 29, 2021), <https://www.nrel.gov/news/program/2021/la-is-prioritizing-environmental-justice-qa-with-jaquelin-cochran.html>.

aesthetic values and land use.²¹⁶ While these impacts are typically associated with NIMBYism, environmental justice communities may object to projects on the same grounds.

Despite the difficulty of considering environmental justice issues directly in preempting local restrictions, there are a number of safeguards that can be put in place to ensure that environmental justice is considered in siting renewable facilities.²¹⁷ New York provides a promising model that requires project proponents to identify impacts on environmental justice communities. Although renewable energy projects generally have far less impact than fossil fuel projects, they are not impact free.²¹⁸ By displacing traditional sources of pollution, renewable energy has the potential to achieve key environmental justice goals by reducing pollution that disproportionately impacts environmental justice communities.²¹⁹

When there is opposition to renewable projects, it is critical to distinguish between concerns that outweigh the potential benefits of a project and those that do not. One approach is differentiating between environmental justice and NIMBY concerns.²²⁰ NIMBY is used broadly to describe opposition to projects based on concerns relating to aesthetics or property values.²²¹ Environmental justice, on the other hand, often focuses on the distribution of impacts and benefits, as well as “racial[] and socio-economic factors that NIMBY responses typically do not [consider].”²²² It has become increasingly common for communities to oppose the development of renewable energy projects both on a project-by-project basis and by enacting ordinances that prevent permitting of all potential renewable projects.

Because the Act allows project proponents to waive local laws that are “unreasonably burdensome,” the challenge is distinguishing between NIMBY and environmental justice–based opposition. The Act does not elucidate this distinction, and it may take time to draw the line between NIMBY and environmental justice—if such a line exists. This is not surprising, as it can be difficult to determine the motives behind an ordinance restricting renewable development. To further muddle this distinction, because environmental justice communities are not monolithic, there may be situations where an environmental justice community opposes a project for reasons that might be traditionally categorized as NIMBY.

Although there are other provisions that aim to ensure that environmental justice communities do not disproportionately bear the burdens of renewable

216. Uma Outka, *Environmental Justice Issues in Sustainable Development: Environmental Justice in the Renewable Energy Transition*, 19 J. ENV'T & SUSTAINABILITY L. 60, 78 (2012).

217. *See generally id.*

218. *Id.* at 69.

219. *Id.* at 70.

220. *Id.* at 76.

221. *Id.*

222. *Id.*

energy development, it is important to include this consideration within the framework of “unreasonably burdensome.” The Act provides some guidance here by requiring “unreasonably burdensome” to be viewed in light of the CLCPA targets and environmental benefits, which include 100% zero-emission electricity by 2040 and reducing GHG emissions 85% below 1990 levels by 2050.²²³ This provides an opportunity for, but does not guarantee, consideration of environmental justice. A better alternative would be to expressly require that the burden of local laws be viewed in light of both the CLCPA targets *and* express environmental justice considerations.

Another feature that seeks to address this concern is the set provisions that ensure economic benefits flow to the host community.²²⁴ Focusing on retaining host-community benefits can “improve local responses to project proposals, neutralize stereotypes that only individuals who earn royalties from leasing land stand to gain, and build support based on clear and tangible benefit to be gained by the community more broadly.”²²⁵ Direct payments to local governments may be the most straightforward way of achieving this, but other approaches could include local employment, discounted electricity, and community funds.²²⁶

E. COMMUNITY INPUT

However, the question remains: When should an environmental justice community that has historically borne the costs of fossil fuel energy be able to exercise its autonomy by banning or shaping renewable energy projects? And how should states go about identifying such communities?²²⁷ Moreover, how can a state ensure that renewable energy projects in environmental justice communities bring net benefits, not harm?

First, it is important to increase participation of local communities, especially environmental justice communities that have been historically excluded from decisionmaking.²²⁸ Providing funding to increase local participation can help prevent environmental justice communities from being left out of decisionmaking and can also help build trust with communities.

223. N.Y. STATE: CLIMATE ACT, <https://climate.ny.gov/> (last visited May 12, 2023) (“On July 18, 2019, the Climate Leadership and Community Protection Act (Climate Act) was signed into law. New York State’s Climate Act is among the most ambitious climate laws in the nation and requires New York to reduce economy-wide greenhouse gas emissions 40 percent by 2030 and no less than 85 percent by 2050 from 1990 levels.”).

224. Outka, *supra* note 79, at 867.

225. *Id.* at 871.

226. *Id.*

227. See generally N.Y. STATE CLIMATE JUST. WORKING GRP., DRAFT DISADVANTAGED COMMUNITIES CRITERIA AND LIST TECHNICAL DOCUMENTATION (2022), <https://climate.ny.gov/-/media/project/climate/files/Technical-Documentation-on-Disadvantaged-Community-Criteria.pdf>. For further discussion of identifying environmental justice communities, see, for example, *Defining Environmental Justice Communities: Using CalEnviroScreen in State Policy*, CAL. ENV’T JUST. ALL., <https://caleja.org/2016/09/defining-environmental-justice-communities-using-calenviroscreen-in-state-policy/> (last visited May 12, 2023); Villa, *supra* note 212, at 487.

228. Outka, *supra* note 79, at 868. Communities sometimes respond by enacting barriers when they are caught off guard by new renewable projects. *Id.*; see also Villa, *supra* note 212, at 486–87.

Unlike direct community benefits, funding to support local participation shows that developers seek to meaningfully engage with the community and not simply buy their support. This type of fund “reduces the disadvantaged position of host communities and local non-profits, especially in an accelerated review process, to engage more quickly and effectively in public participation.”²²⁹ In New York, for example, the Act includes both required public comment periods and funding for community intervenors.²³⁰ Whether this type of fund is effective remains to be seen.

Moreover, community input is at least partially distinct from community authority. While increasing community input increases the likelihood that the input is heard, it is not the same as providing decisionmaking authority. As discussed above, centralized decisionmaking frequently comes at the cost of decreased community input and authority.²³¹

The Act’s implementing regulations also provide some protection for environmental justice communities. Under New York law, such an objection would have to fall under the definition of “unreasonably burdensome.” Pursuant to the Act, the applicant bears the burden of identifying laws that it requests be waived, along with identifying: (1) the degree of burden of the requirement, (2) why the burden should not be borne by the applicant, (3) why the request cannot be obviated by design changes to the facility, and (4) how the adverse impacts of granting the waiver would be mitigated to the maximum extent practicable.²³² Furthermore, “[f]or requests grounded in the needs of consumers, [the applicant must show] that the needs of consumers for the facility outweigh the impacts on the community that would result from refusal to apply the identified local substantive requirements.”²³³

These regulations, paired with the requirements of the Environmental Justice Exhibit, provide some protections for environmental justice communities, but may prove to be inadequate. In showing the unreasonable burden of local regulations, the applicant must essentially demonstrate that the benefits of increased renewable energy outweigh the costs to local communities.²³⁴ Although the impacts may be far less than those associated with fossil fuel energy projects,²³⁵ this same logic—that the benefit to all consumers outweighs local impacts—has led to many current environmental justice issues

229. Outka, *supra* note 79, at 868.

230. *See supra* Part II.B.4.

231. *See supra* Part III.A.

232. N.Y. COMP. CODES R. & REGS. tit. 19, ch. XVIII, § 900-2.25(c) (2023).

233. *Id.* § 900-2.25(c)(3).

234. On its face, this may seem to be a strict cost-benefit analysis, but the implementing regulations do not require any particular form of analysis. Accordingly, applicants are not required to monetize the costs and benefits to make a showing that the benefits outweigh the costs. *See id.* § 900-2.25(c).

235. GROSS, *supra* note 206, at 2.

and “sacrifice zones.”²³⁶ Because of the novelty of the Act, it is not yet clear whether these safeguards will be sufficient to delineate between NIMBY and environmental justice–based opposition to renewable energy projects.

Moving forward, states should seek to fill this gap left in the Act. This could be accomplished by providing additional requirements for waiving local laws in environmental justice communities.

CONCLUSION

The United States has ten years to act to avoid the most catastrophic impacts of climate change.²³⁷ Meeting these goals will require a rapid decarbonization of the electricity sector.²³⁸ This transformation poses both great opportunities and serious challenges. Facing the potential for rapid change, many communities have been hesitant to embrace the siting of renewable energy projects within their territorial limits.²³⁹ If this transition is made without consideration of the impacts on local communities, it could in fact perpetuate a history of concentrating the impacts of energy projects in disadvantaged communities.

A transition to a low-carbon electricity sector could provide jobs and income for rural and historically energy-burdened communities.²⁴⁰ While state preemption of local laws takes power from local governments and municipalities, if designed properly, these programs can deliver great benefits as well. New York’s article 10 program demonstrated some of the pitfalls of programs meant to streamline approval of renewable projects.²⁴¹ Transitioning to a low-carbon future cannot be done in a piecemeal fashion. State policy to preempt local restrictions on renewable energy siting will allow for a more rapid decarbonization of the energy sector. Moreover, if done correctly, it can preserve local input in decisionmaking and help ensure that local communities reap the benefits of renewable energy projects.

236. Adrienne Matei, *What Are ‘Sacrifice Zones’ and Why Do Some Americans Live in Them?*, THE GUARDIAN (Nov. 16, 2021, 6:18 AM), <https://www.theguardian.com/commentisfree/2021/nov/16/what-are-sacrifice-zones-and-why-do-some-americans-live-in-them>; see also STEVE LERNER, SACRIFICE ZONES: THE FRONT LINES OF TOXIC CHEMICAL EXPOSURE IN THE UNITED STATES 2–3 (2010).

237. ALLEN ET AL., *supra* note 5, at 392; see also Watts, *supra* note 5.

238. Gerrard, *supra* note 7, at 10591.

239. See GOYAL, *supra* note 10, at 2.

240. See Jennifer Oldham, *Wind Is the New Corn for Struggling Farmers*, BLOOMBERG: BUSINESSWEEK (Oct. 6, 2016, 11:59 AM), <https://www.bloomberg.com/news/articles/2016-10-06/wind-is-the-new-corn-for-struggling-farmers>.

241. Gerrard & McTiernan, *supra* note 104.